TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 180.

CALVIN A. CALHOUN, APPELLANT,

vs.

OSCAR H. VIOLET.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED OCTOBER 11, 1897.

(16,691.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 7, 1898.

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1 TERRITORY OF OKLAHOMA:

In the Supreme Court of said Territory.

CALVIN A. CALHOUN, Plaintiff in Error,
vs.
OSCAR H. VIOLET, Defendant in Error.

The plaintiff in error, Calvin A. Calhoun, states that on the trial of the above-entitled case many and manifest errors intervened in the rulings and judgment of the court, among which plaintiff assigns the following, in and by which his rights and interest were greatly prejudiced and affected:

1st. The court below erred in sustaining the demurrer interposed by the said defendant below, defendant in error, to the plaintiff's petition and in dismissing said petition on the ground that the matters and things as set out in said petition were not sufficient in law to constitute a cause of action against the said defendant; to which ruling and judgment of the court in sustaining said demurrer and dismissing said suit the plaintiff at the time then and there excepted and still excepts. Plaintiff in error herewith files and causes the clerk of the district court for the third judicial district, by which said court, sitting within and for Oklahoma county, said decision was made and in which said suit was commenced and tried, to certify up the original papers in said cause which are made a part of this petition in error, and by an inspection of which and on the face of said papers the error of the court below in sustaining the aforesaid demurrer to plaintiff's petition, as set out in the order and judgment of said court, is manifest, as said petition does on its face state a good and sufficient cause of action entitling the plaintiff in error to the relief prayed for in his said petition, and the court below erred in not overruling said demurrer and requiring the defendant to answer the said petition; that the judgment of the said district court is contrary to law.

2 Wherefore the plaintiff prays that for the manifest error aforesaid that the judgment of the court below be reversed and set aside, and that said cause be remanded to the court below to proceed to hear and try said cause and render such judgment and *and* decree as in equity and law may be right and proper on such trial.

AMOS GREEN & SON,
Attorneys for Plaintiff in Error.

Endorsed: Calvin A. Calhoun *vs.* Oscar H. Violet. Petition in error. Filed March 9th, '96. Edgar W. Jones, clerk supreme court. Amos Green & Sons, attorneys for plaintiffs in error.

3 TERRITORY OF OKLAHOMA, }
Oklahoma County. }

In the District Court for the Third Judicial District, Sitting within and for the County Aforesaid.

CALVIN A. CALHOUN, Plaintiff, }
against } Petition.
OSCAR H. VIOLET, Defendant. }

The plaintiff, Calvin A. Calhoun, for cause of action against the defendant, Oscar H. Violet, states that the plaintiff is a citizen of the United States; that on and before the 23rd day of April, 1889, he was over twenty-one years of age and the head of a family; that prior to the date aforesaid he never had the benefit of a homestead; that he had all the qualifications under the acts of Congress passed and approved March 1st and 2nd, 1889, and other laws of the United States, entitling him to take and hold a homestead in the lands in the then Indian Territory, now Oklahoma, opened to settlement under the aforesaid acts of Congress and the proclamation of the President of the United States in pursuance of said acts, dated March the 23rd, 1889; that plaintiff is an honorably discharged Union soldier, having enlisted for three years in the Union army in the late civil war and served in said army for the term of about eighteen months, and was honorably discharged because of wounds received in battle; that since his said discharge he has always remained loyal to the Government of the United States; that as such honorably discharged Union soldier he is embraced in the exception and proviso contained in section thirteen of the act of Congress of March the 2nd, 1889, which said proviso is in the following words: "That the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes shall not be abridged."

4 The plaintiff further states that said section of the Revised Statutes of the United States referred to as section 2304 provides as follows: "Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days and was honorably discharged, and has remained loyal to the Government, including the troops mustered into the service of the United States by virtue of the third section of an act approved February the thirteenth, eighteen hundred and sixty-two, and every seaman, marine and officer who has served in the Navy of the United States or in the marine corps during the rebellion for ninety days, and who has been honorably discharged and has remained loyal to the Government, shall, on compliance with the provisions of this chapter as hereinafter modified be entitled to enter upon and receive patent for a quantity of public lands, not exceeding one hundred and sixty acres, or one quarter section to be taken in compact form, according to the legal subdivisions including the alter-

nate sections of public land along the line of any railroad, or other public work not otherwise appropriated. And other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement."

The plaintiff states that under the provisions of the aforesaid section and the homestead laws then in force he was, at the time of the opening of the aforesaid lands to settlement under the acts of Congress aforesaid and the proclamation of the President of the United States and the provisions of the homestead laws of the United States at the time of the passage of said section- 2304 and 2305, duly qualified to enter upon, as an honorably discharged Union soldier, as aforesaid, and make a homestead entry of one quarter section of the lands so opened on the 22nd day of April, 1889, at the proper land office, and that his qualification to take and enter a homestead of one quarter section of any public lands of the United States, subject to homestead entry as defined and required under the Revised Statutes of the United States, were not in any manner enlarged or abridged by the prohibitory provision of section thirteen of the act of March 2nd, 1889, which said prohibitory provision of said section thirteen in relation to entry and occupancy of any of said lands described in said section was and is a qualification and not a penalty, and honorably discharged soldiers are expressly excepted from its provisions in relation to additional qualifications in said section by the proviso hereinbefore set out. The plaintiff further states that, being a duly qualified entryman, as aforesaid, he did on the 23rd day of April, 1889, at the United States land office at Guthrie, Oklahoma, make homestead entry number nineteen for lot- 6, 7, 8, 9, and 10 of section three, township eleven N., range 3 west, in the aforesaid land district, subject to entry at the aforesaid land office, which said tracts of land are in what is now Oklahoma county, in said Territory of Oklahoma, and adjoin the said city of Oklahoma City, and are of the present value of twenty-five thousand dollars; that on the 23rd day of April, 1889, the plaintiff duly inaugurated his settlement upon said lands entered, as aforesaid, as his homestead and commenced making valuable improvements thereon, and has since said date aforesaid up to the present time continuously resided on said land as his homestead and now resides upon the same, and has in all respects complied with the requirements of the homestead law; that his improvements are of the value of about one thousand dollars.

That by letter "C" from the Commissioner of the General Land Office of the United States, at Washington city, D. C., dated February the 17th, 1890, the plaintiff was notified that his entry aforesaid was suspended for the reason that the lands entered, as aforesaid, although only one quarter section and it being in compact form and conforming to the Government survey, yet, being on both sides of the North branch of the Canadian river, and that said river was a meandered stream and entries could not be extended across it, and the

6 plaintuff was by said Commissioner aforesaid required, under a misapprehension and mistake of the law, facts, and rules of the department, to relinquish the lands so entered and settled upon as his homestead, as aforesaid, on one side or the other of said stream, and under both written and verbal protest, and to prevent an illegal cancellation of his entire entry, he did under compulsion of the aforesaid illegal requirement relinquish to the United States lot number ten, lying and being on the south side of said river and containing sixteen and twenty-four hundredth- acres of land.

The plaintiff further states that said river was and is not a meandered stream or river, and that said requirement by the said Commissioner aforesaid was made and said letter written and sent out by said Commissioner under a misapprehension of the law and the facts; and said requirement was contrary to law and beyond the powers and jurisdiction of said Commissioner; and said relinquishment, being made by the plaintiff under protest, as aforesaid, and by illegal requirements and compulsion, as aforesaid, and under mistake of the law and facts by said Commissioner, was and is illegal and void and did not divest the plaintiff of his right and interest and equity in and to said tract of land acquired by his entry and settlement aforesaid.

That plaintiff afterwards, and when said mistake on the part of said Commissioner of the General Land Office was discovered, filed with said Commissioner an application to correct said mistaken and forced relinquishment and to reinstate plaintiff's filing on said land.

That said Commissioner has wholly neglected, failed, and refused to take any action on the said application. A copy of said application is herewith filed, marked Exhibit "B," and made a part of this petition. And in violation of plaintiff's rights and of law, equity, and good faith, and with a full knowledge of all the facts aforesaid, the defendant, Oscar Violet, was wrongfully permitted and did enter said lot number ten aforesaid, and since his said entry has made final proof and received a final certificate for said lot number ten, which has passed to him all the right, title, and interest of the United States and the *and the* title to said tract
7 of land, and said final certificate as to the United States is equivalent to a patent and vests the title in the holder thereof; that said defendant had full information and knowledge of all the facts aforesaid and of the misapprehension under which the aforesaid relinquishment was made, and of the fact that plaintiff had applied to have the same reinstated, and that plaintiff continued to claim said lot number ten as covered by his entry aforesaid; and that by reason of the illegal requirement aforesaid and the mistake and misapprehension under which it was made rendered said relinquishment voidable and did not divest plaintiff's equity. The plaintiff states that said defendant obtained the entry and final certificate aforesaid in fraud of plaintiff's rights and equities in and to said land and in violation of law and of the superior equity of the plaintiff, and holds the same in trust for plaintiff. The plaintiff further states that on May 21st, 1889, one Theodore W. Echelberger

filed a contest against the plaintiff, alleging prior settlement and charging that plaintiff was a disqualified entryman by reason of having, as said contestant charged, entered the Oklahoma country during the prohibited period, in violation of section thirteen of the act of Congress of March the second, 1889; all of which plaintiff states is wholly false and unproved by any preponderance of evidence, except the fact that plaintiff on the 20th day of April, 1889, left Arkansas City on the railroad train; came to Oklahoma Station on said train, arriving about five o'clock p. m. of the 20th and remaining all night, leaving next morning about half past 8 o'clock a. m. on the train, returning to Arkansas City, where he remained until April 22nd, 1889, leaving said city on the railroad train which entered Oklahoma after twelve o'clock noon on said day, reaching Guthrie, in said Oklahoma, on the afternoon of April 22nd, and remaining at Guthrie until April 23rd, when he filed homestead entry number nineteen on the land heretofore described, and came to Oklahoma Station and went on the land and made settlement under his said entry on the afternoon of April 23rd, 1889. The plaintiff further states that on May 27th, 1889, one James McCor-
nack also filed a contest against the plaintiff and said
8 Echelberger, alleging that both were disqualified and had entered the Oklahoma country during the prohibited period and in violation of said section thirteen of the aforesaid act of Congress of March 2nd, 1889; and further charging that the plaintiff had made his said entry of said land for speculation purposes; all of which charges are false and were never established by any credible evidence; that on June 20th, 1890, one Thomas J. Bailey filed a contest, charging the plaintiff and Echelberger had violated the law by entering the said Territory during said prohibited period; which said charge, as to the plaintiff, was untrue, except as hereinbefore stated; also charging said McCornack with filing his aforesaid contest for speculation purposes and claiming that he, Bailey, was the first legal settler; that on January 25th, 1890, one Linthisum filed a contest against said lot number ten, alleging the segregation of said lot from lots 6, 7, 8, and 9 by the meanderings of the North Canadian river, which was a misapprehension, said river not being a meandering stream.

That on October the 30th, 1890, all parties to said contests appeared at the local United States land office in Oklahoma City, Oklahoma Territory, and the trial of said contests was had before the register and receiver of said office, and said register and receiver rendered a decision finding that the plaintiff herein and the aforesaid Echelberger were both disqualified to make entry of lands in the Territory of Oklahoma; that said contestant Bailey had failed to establish his claim of prior settlement on the land, it having been previously segregated by the entry of this plaintiff, and dismissed the contests of Echelberger and Bailey and Linthicum and recommended that the entry of this plaintiff be cancelled, and that contestant McCornack be awarded a preference right of filing on said land.

From this decision appeals were taken by this plaintiff and the

other parties to the honorable Commissioner of the General Land Office, at Washington city, D. C. That on the — day of ——, 1893, the said Commissioner rendered a decision affirming the
9 aforesaid decision of the register and receiver of the local land office. In rendering said decision aforesaid the said Commissioner does not review or pass upon the evidence or legal questions involved. From said decision of the Commissioner aforesaid appeals were taken to the honorable Secretary of the Interior, and on the 22nd day of November, 1893, the Assistant Secretary of the Interior rendered a decision affirming that of the register and receiver without exam-ing or passing upon the questions of law or fact and the rulings assigned as errors in said appeal, and makes the following statement why he does not review or pass upon any of the questions before him on said appeal: "On the questions of fact raised herein the evidence is conflicting, and it appearing that the concurring conclusions of your office and the local officers are 'not clearly erroneous,' in such cases it is against the policy of the department to interfere. There judgment of your office is affirmed."

That after the aforesaid decision by the honorable Assistant Secretary of the Interior a petition and motion for review was filed with the Secretary of the Interior, and on July 13th, 1894, he rendered a decision thereon, in which decision the honorable Secretary misapprehends both the law and the facts. A copy of said erroneous decision is herewith filed to show the mistakes and errors of said Secretary. The plaintiff states that the said Secretary has entirely misapprehended and misstated the facts as shown by the evidence. In thus stating the testimony given by this plaintiff, the honorable Secretary says: "That on his arrival at Oklahoma Station (meaning plaintiff's arrival) on Monday, April 22nd, 1889, he went with his son directly to the tent which his son had erected on the land in contest, and that he, the entryman, leaving his son in charge of the tent and the land, went immediately to the Guthrie land office and arrived there in time to secure homestead entry No. 19 on said land." This is a mistake. Plaintiff gave no such evidence, but testified in substance as follows: "That he left Arkansas City on the 22nd day of April, 1889, on the train that entered the Territory of Oklahoma after twelve o'clock noon of said day; that
10 he stopped at Guthrie, and on April the 23rd, 1889, made his filing at the U. S. land office at Guthrie, and on the afternoon of April 23rd, 1889, and after having made his said entry, he went to Oklahoma Station, and then went upon the land in controversy on the afternoon of the 23rd; that he did not know that his son had settled upon or intended settling upon said tract of land at the time he made his said entry, and that no agreement or understanding existed between him and his son in regard to the latter going upon and holding said tract of land until the plaintiff could file thereon, nor did plaintiff know when he made his said entry that his son was on said tract of land. Plaintiff says there was no evidence showing any collusion between plaintiff and his son, who is shown by the evidence to have been at that time a man about thirty years of age, which in the evidence of this plaintiff and his said son

given on the trial of said contests they expressly testify that there was none, and the honorable Secretary seems to and did act and render his said decision on an entire misapprehension of the facts as established by the evidence.

The plaintiff further states that the honorable Secretary also in said decision misapprehended the law applicable to the facts of the true case and also applicable to the erroneous statement of facts made by said Secretary in holding that such statement of facts would in law "be fatal to plaintiff's right to make entry of said land," even if plaintiff had not been, as heretofore stated, an honorably discharged Union soldier, excepted from the additional qualification provided by the prohibitory clause of said section thirteen of the act of Congress of March 2nd, 1889; and under the law and the decision of the Supreme Court of the United States the plaintiff, having, as admitted and shown by the uncontradicted and positive evidence on the trial of said contest cases that plaintiff was outside the limits of said territory, opened as aforesaid, and came in after twelve o'clock noon on said April the 22nd, 1889, was not by reason of his previous admitted entry, as hereinbefore stated, disqualified, but was within the spirit of the law a qualified entryman.

11 The plaintiff says that all the decisions and rulings hereinbefore set out holding that this plaintiff was not a duly qualified entryman on the evidence taken in the contest cases aforesaid were made under a misconstruction of both the law and the facts and are in law erroneous, illegal, and to the great prejudice of the rights of this plaintiff: that the cancellation of his aforesaid entry was wrongfully made, under a mistake and misapprehension of both the law and facts, and that said mistaken and erroneous cancellation did not divest the plaintiff of his superior equity and right in and to said lands, and that the rights acquired by the defendant, Oscar Violet, as aforesaid, by his aforesaid entry, final proof, and final certificate aforesaid are in equity held by him in trust for this plaintiff. The plaintiff states that all the aforesaid rulings and decisions of the Land Department were made under the misapprehensions of the law and fact, and the questions raised by the appeals and motion for review of the plaintiff were never examined or reviewed by the honorable Commissioner and Secretary of the Interior and the facts found and the law properly applied to the facts; and plaintiff's homestead filing, made as aforesaid, was illegally cancelled, and said decisions are erroneous by reason of the unfairness, misconstruction, and misapprehension aforesaid and are contrary to law and equity, and plaintiff's equities and rights in and to said land cannot be divested and taken away except by the adjudication of a court of competent jurisdiction; that plaintiff's rights and equities, as hereinbefore set out and stated, are in no manner destroyed or taken away by the aforesaid wrongful, mistaken decisions and the aforesaid forced and illegal relinquishment and the aforesaid erroneous and mistaken cancellation of plaintiff's said entry. The said register and receiver and the Commissioner of the General Land Office and the honorable Secretary of the Interior each and all erred and misapprehended the law:

First. In holding that plaintiff, being an honorably discharged Union soldier, as aforesaid, and filing with his said application to enter said land the requisite soldier's affidavit establishing
12 said facts, was still subject to the new and additional qualification required by what is known and called the prohibitory provisions of section thirteen of the act of Congress of March the 2nd, 1889, the plaintiff being expressly by the aforesaid proviso of said section and act excepted from its provision and from any and all abridgement of his rights as defined by the aforesaid section- 2304 and 2305 of the Revised Statutes of the United States.

Second. That the ruling, holding, and sending out of the circular letter aforesaid by the honorable Commissioner of the General Land Office of the date aforesaid that the North branch of the Canadian river was a meandered stream, and requiring the plaintiff, under penalty of cancellation of his filing, to relinquish the land embraced in his said entry on one side or the other of said stream, was a misapprehension of the facts and a misconstruction of the law as to what constituted a meandered stream and was contrary to law.

Third. The holding and decision by the officers of the Land Department and the Hon. Secretary of the Interior that any temporary entry into the Territory to be opened between the 2nd day of March and 22nd day of April, at twelve o'clock noon, 1889, where the party was outside the Territory prior to and at the time when entry could legally be made at the said hour of twelve o'clock noon, and came in rightfully after said hour, was disqualified by reason of the previous entry or passage on the railroad train from Arkansas City, in the State of Kansas, on the 20th day of April, 1889, to Oklahoma City and a return on a trian in said railroad on June 21, 1889, to Arkansas City, is a misconception of the law and a misapprehension of the spirit and purpose of the prohibitory provision of the aforesaid section of said act of Congress and erroneous.

Fourth. The holding and decision that because the son of plaintiff, a man thirty years of age and not under the control of the plaintiff, and without any collusion or agreement of plaintiff, after twelve o'clock noon on April 22nd, 1889, disqualified the
13 plaintiff and rendered his said entry collusive and fraudulent, was and is erroneous and contrary to law and equity and all rules applicable to the construction of evidence, and in violation of the maxims and rule of law that fraud is never presumed but must be clearly proved.

Fifth. The rulings and findings of the register and receiver and the Commissioner as to what are the rights and privileges of a homestead entryman in clearing land and selling timber not needed for improvements, from such clearing, are also erroneous and a misconception of the homestead law.

Sixth. And the rulings on the evidence and the law made by the departments aforesaid were and are contrary to the evidence, law, and equity of the case and violation of the rights of the plaintiff, and the aforesaid cancellation of his said entry was erroneous, illegal, and contrary to the law and evidence of the case.

Wherefore the plaintiff says that the title acquired, as aforesaid,

by the said defendant is subject to the superior equity of the plaintiff, and that he is in equity entitled to have a resulting trust declared and said tract of land embraced in lot number ten conveyed to the plaintiff by proper decree, and for judgment for costs; and he prays for all other and further relief which to equity pertaineth and the nature of the case requires.

AMOS GREEN & SON,
Attorneys for Plaintiff.

Endorsed: Filed in district court, Oklahoma county, O. T., Mar. 6, 1895. W. H. Ebey, clerk, by J. B. Sanders, deputy.

14 EXHIBIT "C."

(Copy.)

THEODORE ECHELBERGER ET AL.
vs.
CALVIN A. CALHOUN.

JULY 13, 1894.

The Commissioner of the General Land Office.

SIR: The case is now before me upon two motions for review of departmental decision of Nov. 22, 1893—one filed on Januarv 16, 1894, by C. A. Calhoun, which acknowledged service of the adverse decision on Dec. 23, 1893. I have entertained both motions.

The testimony of Calvin A. Calhoun himself, as quoted by Messrs. Perkins & Chandler, his attorneys, on pages 17 and 18 of their brief, shows that he arrived at Oklahoma Station from Arkansas City on Saturday, April 20, 1889, after dark, and remained there that night, and left for Arkansas City Sunday morning at 8.30 o'clock; that on his arrival at Oklahoma Station on Monday, April 22, 1889, he went with his son directly to the tent which his son had erected on the land in contest, and that he, the entryman, leaving his son in charge of the tent and the land, went immediately to the Guthrie land office and arrived there in time to secure homestead entry No. 19 on said land. Mr. Calhoun's own testimony is fatal to his right to make entry of said land or acquire any right thereto. His motion for review is denied.

Bailey's motion for review is based upon t vo grounds:

"1. That the decision is against the weigh of the facts and contrary to law.

"2. That the register and receiver allowing Calhoun to make homestead entry on April 23, 1889, did not thereby segregate the land in contest from the public domain."

The papers upon which Calhoun's entry was allowed were regular in form and sufficient in substance and *prima facie* valid.

15 The local officers were obliged to allow the entry and mark the land taken upon their tract book and to refuse to make any other inconsistent entry on the same tract.

It was not decided that Calhoun was a sooner until Nov. 22,

1893, when the Secretary affirmed the decision of the Commissioner, and the tract book is not even yet clear of Calhoun's entry in consequence of the pending motions for review. The tract in question was segregated by the H. E. of Calhoun, although it may have been improperly allowed.

No valid reason is assigned by Bailey why the mass of testimony taken in this case should be reopened and considered for the fourth time. The local officers, the Commissioner, and the First Assistant Secretary have each in turn carefully examined the recorded testimony. Bailey, as the 3rd contestant, is contented with their concurrent findings against Calhoun and Echelberger and complains only of their findings in favor of McCornack, who was the second contestant. The finding is that Bailey failed to prove his allegation against McCornack. There is nothing in the papers before me to justify the belief that injustice has been done, or that a fourth examination of the testimony will change the result.

Bailey's motion for review is denied. The papers are herewith returned.

Very respectfully, HOKE SMITH, *Secretary.*

Endorsed: Filed in district court, Oklahoma county, O. T., Mar. 6th, 1895. W. H. Ebey, clerk, by J. B. Sanders, deputy.

16

(Copy.)

OKLAHOMA CITY, OKLAHOMA, *May 15th*, 1893.

Hon. S. W. Lamoreaux, Commissioner of General Land Office.

SIR: Your petitioner, Calvin A. Calhoun, residing near Oklahoma City, O. T., respectfully represents that on April 29th, 1889, he made homestead entry No. 19 on lots 6, 7, 8, 9, and 10, sec. 2, tp. 11, R. 3 W., at the land office at Guthrie; further. that by letter "C" from the General Land Office of February 17th, 1890, said entry was suspended for the reason that the lands entered were on both sides of a meandered stream, viz., the North branch of the Canadian river, and your petitioner was induced to relinquish said lot 10 to the Government on March 17th, 1890.

Thereupon said entry as to said lot 10 was cancelled.

Your petitioner is now informed that said North branch of the Canadian river is not a meandered stream; that the suspension of his said entry was made under a misapprehension of the facts in the case, and that a relinquishment by him of lot 10 should not have been demanded.

Your petitioner would state further that said lot 10 contains sixteen and 24 one-hundredths acres, and is a very essential and important portion of his claim. His entire entry, including said lot 10, embraces only $148\frac{14}{100}$ acres, which is $11\frac{86}{100}$ less than the area allowed under the homestead law.

For the reasons stated your petitioner asks that he be allowed to withdraw his said relinquishment, and that his entry No. 19, as to lot 10, be reinstated upon the records of the General Land Office.

CALVIN A. CALHOUN.

TERRITORY OF OKLAHOMA, } ss:
County of Oklahoma, }

Calvin A. Calhoun, being fuly sworn, deposes and says that the statements made by him in the foregoing petition are true and correct, as he verily believes.

——.

16½ Sworn to and subscribed before me this 15th day of May 1893.

J. MILTON,
Notary Public.

Com. expires Jan. 2nd, 1895.

17 "H."
M. S. W.
Doc. 4, case 6323.

4–207.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 26, 1895.

I, Silas W. Lamoreux, Commissioner of the General Land Office, do hereby certify that the annexed copies of soldier's affidavit and certificate of service in H. E. No. 19, of Calvin A. Calhoun, and of his relinquishment of said entry as to lot 10, executed March 17, 1890, in the case of Theodore W. Echelberger *et al. vs.* Calvin A. Calhoun, for lots 6, 7, 8, 9, and 10, in sec. 3, tp. 11 N., R. 3 W., Oklahoma, Oklahoma, are true and literal exemplifications of the originals now on file in this office, and the copy of office letter (C), dated February 17, 1890, relative to said entry, is a true and literal exemplification of the press copy of the original.

In witness whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] S. W. LAMOREUX,
Commissioner of the General Land Office.

18 (4–065.)

Soldiers' and sailors' homesteads under act June 8, 1872.

Affidavit.

No.—

LAND OFFICE AT GUTHRIE, O. T., *April* 23, 1889.

I, Calvin A. Calhoun, of St. Joseph, Mo., do solemnly swear that I am a head of a family, of the age of twenty-one years, and a citizen of the United States; that I served for ninety days in Co. H of the Seventh Missouri cavalry regiment, United States volunteers;

that I was mustered into the United States military service in September, 1861, and was honorably discharged therefrom in November, 1862; that I have since borne true allegiance to the Government; that *he is* unable to furnish copy of *his* discharge or to procure evidence of *his* witnesses as to *his* service in army, and that I have made my application No. — to enter a tract of land under the provisions of the act of June 8, 1872, giving homesteads to honorably discharged soldiers and sailors, their widows and orphan children; that I have made said application in good faith, and that I take said homestead for the purpose of actual settlement and cultivation, and for my own exclusive use and benefit and for the use and benefit of no other person or persons whomsoever, and that I have not heretofore acquired a title to a tract of land under this or the original homestead law approved May 20, 1862, or the amendments thereto, or voluntarily relinquished or abandoned an entry heretofore made under said acts, so help me God.

CALVIN A. CALHOUN.

Sworn and subscribed to before me, John I. Dille, register of the land office at Guthrie, this 23rd day of April, 1889.

JOHN I. DILLE, *Register.*

19

Certificate of Service.

Illustration of eagle.

To all whom it may concern:

This is to certify that Calvin A. Calhoun, who was enrolled on the 1st day of September, one thousand eight hundred and sixty-one, to serve three years, was discharged on the 10th day of September, 1862, by reason of disability, at Sedalia, Missouri, while holding the grade of private in Company "H," 7th regiment of Missouri cavalry colunteers, formerly Co. "A," 22nd Missouri inft.

This certificate is given upon evidence that the original discharge has been lost or destroyed, and in all cases upon the condition imposed by the act of Congress approved March 3, 1873, that it "shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty, or other allowance or as evidence in any other case."

Given at the War Department, Washington, D. C., this 19th day of December, A. D. 1889.

By authority of the Secretary of War.

F. C. AINSWORTH,
Captain and Ass't Surgeon U. S. A.

3-566.
Mac. 88720.

Endorsed: 1890. 155,918-1. Soldier's certificate of service, 7th Mo. cavalry.

20 No. —.

Received for filing Mar. 18, 1890, at Guthrie land office, Ind. Ter.

Relinquishment.

INDIAN TERRITORY, }
Oklahoma City, } ss:

Know all men by these presents that, pursuant to instructions contained in circular letter of Febr. 17th, '90, issued from the Gen. Land Office and to me directed, I, Calvin A. Calhoun, hereby relinquish to the United States all that portion of land on the right bank of the North Canadian river known and designated as lot No. (10) ten, in the N. W. quarter of section 3, township 11 N., range 3 west, Guthrie land district, the same having been embraced within my original entry No. 19, dated April 23d, A. D. 1889.

CALVIN A. CALHOUN.

On this 17th day of March, A. D. 1890, before me personally came Calvin A. Calhoun, to me known to be the individual described in and who executed the above instrument in writing, and acknowledged that he executed the same for the purposes therein mentioned.

WM. A. MONROE,
U. S. Com'r, Dist. Kansas.

Cuicuit Court
Seal,
District of Kansas.

Cancelled by relinquishment March 18, 1890, at 11.40 a. m.

Endorsed: No. —. Received for filing Mar. 18, 1890, at Guthrie land office, Ind. Ter. 1890. 46424-1.

21 Refer in reply to this initial, C.

DEPARTMENT OF THE INTERIOR, W. H. L. J. P.
GENERAL LAND OFFICE, J. V. W. C. G. T.
WASHINGTON, D. C., *Feb.* 17, 1890. J. C.

Address only the Commissioner of the General Land Office.

Register & receiver, Guthrie, Indian Ty.

GENTLEMEN: The following homestead entries are suspended for the reason that, in each case, the land entered lies on both sides of a meandered stream, and the entry was therefore improperly allowed:

No. 19, filed April 23, 1889, by Calvin A. Calhoun, for lots 6, 7, 8, 9, & 10, sec. 3, tp. 11 N., R. 3 W.

No. 70, filed April 24, 1889, by John W. Clifford, for lots 3, 4, 5, 6, 7, 8, and S. E. ¼, sec. 25, *yp.* 13 N., R. 2 W.

No. 87, filed April 25, 1889, by Wm. H. Cunningham, for lots 3, 4, 5, 6, 7, & N. W. ¼, sec. 35, tp. 12 N., R. 3 W.

No. 100, filed April 25, 1889, by John H. Hatfield, for N. E. ¼ or lots 1, 2, 3, 7, 13, 15, 17, & 18, sec. 2, tp. 11 N., R. 3 W.

This party has relinquished lots 2 & 3 of said section, but lot 1 remains on the opposite side of the stream from the main portion of his entry.

No. 102, filed April 25, 1889, by Lewis Rockwood, for S. W. ¼ or lots 8, 9, 10, & S. ½, S. W. ¼, sec. 5, tp. 11 N., R. 3 W.

No. 119, filed April 25, 1889, by John C. Lindsay, for N. E. ¼ or lots 12, 16, 17, 18, & 19, sec. 1, tp. 12 N., R. 1 W.

No. 120, filed April 25, 1889, by Ulysses G. Allen, for N. W. ¼ or lots 1, 2, 3, 13, 14, & N. E. ¼, N. W. ¼, sec. 26, tp. 13 N., R. 1 W.

No. 122, filed April 25, 1889, by Fhielden V. Jones, for S. E. ¼ or lots 3, 4, 5, & 6, sec. 35, tp. 13 N., R. 1 W.

22 No. 139, filed April 25, 1889, by Leonidas N. Deweese, for N. E. ¼ or lots 1, 2, 7, & W. ½, N. E. ¼, sec. 35, tp. 13 N., R. *L* W.

No. 179, filed April 26, 1889, by Fletcher M. Fariss, for S. E. ¼ or lots 1, 16, 17, and W. ½, S. E. ¼, sec. 5, tp. 11 N., R. 3 W.

No. 187, filed April 26, 1889, by John A. J. Baugness, for N. W. ¼ or lots 4, 5, 6, 7, & 11, sec. 5, tp. 11 N., R. 3 W.

No. 932, filed May 7, 1889, by Alice Nix, for N. E. ¼, for lots 1, 2, 3, & W. ½, N. E. ¼, sec. 27, tp. 13 N., R. 1 W.

You will notify the claimant in each case of this fact and allow him thirty days from receipt of notice in which to elect which portion of his claim he will relinquish, so that the land remaining will be confined to one side of such stream. Should any of the parties desire to do so, he may relinquish his entire entry; in which event an application to make a second entry of a specific tract will receive due consideration.

If any of the entryman fail or refuse to take action within the time specified, his entry will be held for cancellation. Notify the parties in accordance with circular of Oct. 28, 1886 (5 L. D., 204), and in due time transmit the evidence of such notice, with your report of the action taken, to this office.

Very respectfully,

L. A. GROFF,
Commissioner.

Endorsements: Copy of application for reinstatement on lot 10, in sec. 3, tp. 11, R. 3 W., by Calvin A. Calhoun. Filed in district court, Oklahoma county, O. T., Mar. 6, 1895. W. H. Ebey, clerk, by J. B. Sanders, deputy. No. 1088. Calvin A. Calhoun *vs.* Oscar H. Violet. Petition. Filed in district court, Oklahoma county, O. T., Mar. 6, 1895. W. H. Ebey, clerk, by J. B. Sanders, deputy. Amos Green & Son, attorneys for plaintiff.

23 In the District Court of the Third Judicial District within and for the County of Oklahoma, Territory of Oklahoma.

CALVIN A. CALHOUN, Pl'ff,
vs.
OSCAR H. VIOLET, Def't. } Demurrer.

Now comes the said defendant, Oscar H. Violet, and demurs to the petition of the said plaintiff, Calvin A. Calhoun, filed in this action, and for cause and ground of said demurrer says:

That said petition does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against this defendant.

SELWYN DOUGLAS,
Attorney for Defendant.

Endorsed: No. 1088. Calvin A. Calhoun, pl'ff, *vs.* Oscar J. Violet, def't. Demurrer. Filed in district court, Oklahoma county, O. T., Nov. 8, 1895. W. H. Ebey, clerk, by T. A. Neal, deputy.

24 On May 11th, 1895, the same being the 46th judicial day of the March, 1895, term, the following proceedings were had:

C. A. CALHOUN
vs. } 1088.
O. H. VIOLET.

Plaintiff agrees that defendant may withdraw motion filed herein and file demurrer.

25 And on September 4th, 1895, the following proceedings were had:

CALHOUN
vs. } 1088.
VIOLET.

Continued for term.

26 And on November 11th, the same being the 7th judicial day of the November, 1895, term, the following proceedings were had:

C. A. CALHOUN
vs. } 1088.
O. H. VIOLET.

Comes now all parties hereto, and the case being called for hearing, the same is argued and passed for determination.

27 And on November 19th, 1895, the following proceedings were had:

C. A. CALHOUN
vs. } 1088.
O. H. VIOLET.

Demurrer to petition sustained. Exceptions allowed. 5 days given to amend petition.

28 And on December 23rd, 1895, the following proceedings were had:

C. A. CALHOUN
vs.
O. H. VIOLET. } 1088.

Counsel present. Demurrer sustained. Exceptions allowed. Appeal granted. Notice of appeal given.

29 And on December 26th, 1895, the following proceedings were had:

CALVIN A. CALHOUN
vs.
OSCAR H. VIOLET. } 1088.

Now, on this 23rd day of December, 1895, it being one of the days of the regular November, 1895, term of said court, this cause came on to be heard upon the demurrer filed by the defendant in said action to the petition of said plaintiff; and the court, having heard the argument of counsel and being fully advised in the premises, doth sustain said demurrer; to which order of said court sustaining said demurrer the said plaintiff duly excepted and still excepts, and upon application the said plaintiff is given five days in which to amend his petition, and the said defendant to have twenty days thereafter in which to plead.

H. W. SCOTT,
Judge of said Court.

O K.
AMOS GREEN & SON,
Att'ys for Plaintiff.

30 TERRITORY OF OKLAHOMA, } ss:
Oklahoma County,

I, W. H. Ebey, clerk of the district court of the third judicial district within and for Oklahoma county, said Territory, do hereby certify that the within petition of plaintiff and demurrer of defendant are the original petition of plaintiff and demurrer of defendant filed in this office — to be a true, full, and complete copy of the proceedings in open court, as shown by the records of my office.

Witness my hand and the seal of said court, affixed at my office, in Oklahoma City, O. T., this the 9th day of March, 1896.

[SEAL.]

W. H. EBEY, *Clerk,*
By R. HARRISON, *Deputy.*

Case-made endorsed: Filed March 9, 1896. Edgar W. Jones, clerk supreme court.

30½ CALVIN A. CALHOUN
vs.
OSCAR H. VIOLET. } #435.

And now, to wit, on this the tenth day of June, A. D. 1896, the above cause was at this time taken up on the record and briefs.

CALVIN A. CALHOUN
vs.
OSCAR H. VIOLET. } # 435.

And now, to wit, on this the fourth day of September, A. D 1896, the above cause having come for final decision, and the court being fully advised in the premises, it is therefore considered, ordered, and adjudged that the judgment of the lower court be affirmed, with costs to the above plaintiff in error.

Opinion by Dale, C. J. Justice Scott, having presided at the trial of the cause in the court below, not sitting; the other justices concurring.

31 In the Supreme Court of the Territory of Oklahoma.

CALVIN A. CALHOUN
vs.
OSCAR H. VIOLET.

Syllabus.

1. Homestead—Union soldiers.—Under the act of March 2, 1889, the provision of sec. 13, which reads as follows: "That * * * until said lands are open to settlement by proclamation of the President no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands, or acquire any rights thereto," is applicable to honorably discharged Union soldiers to the same extent as it is to all other citizens.
2. Equity—Findings of fact by Land Department.—Where a proceeding is brought in a court of equity for the purpose of declaring the holder of the legal title to a tract of land entered under the provisions of the homestead law of the United States a trustee for the benefit of one who claims a superior title in equity, the facts as found by the Land Department will be accepted as conclusive by the court.

Suit in equity, brought to declare the holder of the legal title a trustee for the benefit of one who claims a superior title in equity. Decision of the lower court affirmed. The opinion states the facts.

Amos Green & Son, attorneys for plaintiff in error.

Selwyn Douglas and McGreggor Douglas, attorneys for defendant in error.

DALE, *C. J.:*

This is an action commenced in the district court of Oklahoma county on March 6, 1895, by Calvin A. Calhoun against Oscar H. Violet, for the purpose of obtaining in said court a decree in favor of Calhoun declaring Violet to hold the legal title to lot 10, sec. 3, in township 11 north, range 3 west, in trust for the use and benefit of Calhoun. The court below sustained a demurrer to the petition,

and to reverse the ruling thereon the cause is brought here.

32 Briefly stated, the facts as set forth in the petition are as follows: On April 23, 1889, Calhoun filed in the Guthrie land office a homestead entry for lots 6, 7, 8, 9, and 10, sec. 3, township 11 north, range 3 west, situated in Oklahoma county, lots 6, 7, 8, and 9 of such tract lying north and lot 10 thereof lying south of the Canadian river. On February 17, 1890, the Commissioner of the General Land Office suspended the entry for the reason that the tract of land embraced therein lies on both sides of a meandered stream, and in his letter of suspension directed the local office to notify the entryman of such fact and allow him thirty days to elect which portion of his claim he would relinquish, and in the event of a failure to so elect his entry would be held for cancellation. Calhoun, under the directions contained in the letter from the Commissioner of the General Land Office, on March 7, 1890, relinquished lot 10, the part lying south of the river. Violet, immediately upon such relinquishment, filed a homestead entry therefor, and on December 29, 1893, made his final proof and received the receiver's final certificate for the tract. May 15, 1893, Calhoun filed an application to be reinstated in his homestead entry for lot 10, it having been decided in the meantime that the order requiring Calhoun's relinquishment for such lot was erroneous. No appeal was taken from the order of the Commissioner requiring Calhoun to relinquish, and no steps appear to have been taken by him to have his entry reinstated from that time of his relinquishment until he filed his application to be reinstated. Shortly after April 23, 1889, the date of Calhoun's homestead filing, numerous contests were filed against his entry, in which contests it was alleged that Calhoun was disqualified from entering lands in Oklahoma Territory by reason of being within the boundaries of the Territory, opened to settlement under the act of March 2, 1889, subsequent to that date and prior to noon of April 22 following. After Calhoun's relinquishment to lot 10 these contests appear to have been carried on only with reference to that part of the land lying north of the Canadian

33 river, which was embraced in Calhoun's entry after his relinquishment to the portion thereof lying south of such river. As the result of such contests, Calhoun's entry was finally cancelled upon the ground that he was disqualified to enter the land, and in his final decision upon the motion for review the Hon. Secretary of the Interior uses the following language:

"The testimony of Calvin A. Calhoun himself, as quoted by Messrs. Perkins & Chandler, his attorneys, on pages 17, 18 of their brief, shows that he arrived at Oklahoma Station from Arkansas City on Saturday, April 20, 1889, after dark, and remained there that night, and left for Arkansas City Sunday morning at 8.30 o'clock; that on his arrival at Oklahoma Station on Monday, April 22, 1889, he went with his son directly to the tent which his son had erected on the land in contest, and that he, the entryman, leaving his son in charge of the tent and the land, went immediately to the Guthrie land office and arrived there in time to secure homestead entry No.

19 on said land. Mr. Calhoun's own testimony is fatal to his right to make entry of said land or acquire any right thereto."

In the petition filed in the court below Calhoun alleges that he is an honorably discharged Union soldier, and attaches a copy of his discharge to such effect. It is claimed in the petition and urged as a ground of equitable relief that the Secretary of the Interior misapplied the law, first, in holding that Calhoun was disqualified by reason of being within the Territory during the inhibited period of time; and, second, that the prohibition contained in the law which excludes those violating the same from acquiring land is not applicable to an honorably discharged Union soldier. The demurrer to the petition alleges a failure to state a cause of action, and the decision of the lower court sustains the same for that reason.

We think the law properly applied to the facts as found by the Land Department is sufficient upon which to base a finding that Calhoun was disqualified to enter the land. It is well settled that a person who was within the boundaries of the land thrown open to settlement under the act of March 2, 1889 (25 Stat. U. S., 1005), subsequent to March 2, 1889, and prior to noon of April 22, 1889, and who by reason of having been therein gained an advantage over those who remained outside, is thereby disqualified from
34 acquiring any land thrown open to settlement under the provisions of the act of March 2, *supra*. Smith *v.* Townsend, 1 Okla., 117, and 148 U. S., 490. Under the facts as found by the Land Department, Calhoun had entered upon and occupied a portion of the lands thrown open to settlement under the provisions of the act of March 2, *supra*, during the inhibited time, and such facts so found are binding upon the courts. Johnson *v.* Towsley, 13 Wall., 72; Marquez *v.* Frisbie, 101 U. S., 473; Lee *v.* Johnson, 116 U. S., 48, and cases therein cited.

These facts so found by the Land Department are sufficient to defeat Calhoun's title before the Land Department and in the courts also, unless the contention of counsel be correct that honorably discharged Union soldiers are exempted from the prohibition contained in the act of March 2nd, *supra*. The provision of the law upon which counsel rely is found in sec. 13 of said act, and is as follows: "Provided that the rights of honorably discharged Union soldiers in the late civil war, as defined in sections 2304 and 2305 of the Revised Statutes, shall not be abridged." This is follows by a proviso in the same section, which second proviso reads: "And provided further that * * * until such lands are opened to settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said land or acquire any rights thereto." Counsel for appellant insist that the latter proviso has no limiting effect upon the former. We cannot assent to this contention. It is, we think, the universally accepted rule of construction that the natural and appropriate office of a proviso is to restrain and qualify some matter which precedes, and it should be so confined. Sutherland on Statutory Construction, sec. 233. If by an examination of the subject-matter of the law the intent of the

makers of the statute be ascertained, then the proviso should always be construed with reference to such intent. In the act of Congress of March 2, *supra*, we find that Congress intended in opening these lands to settlement to reserve to honorably discharged Union
35 soldiers certain rights which they then possessed under sections 2304 and 2305, Revised Statutes of the United States. In section 2304 the right was given to such soldiers to file a declaratory statement for land, which statement, when filed, should operate to reserve the land from any other filing for a period of six months. Other provisions of this section changed the law previous to its adoption in force to the extent only of permitting a soldier in person or by his agent to file a declaratory statement instead of a homestead entry, which declaratory statement should operate to reserve the land for a period of six months, at which time the soldier might file his homestead entry therefor. To that extent only did it change the law previously in force. Sec. 2305 provided that the time which the homestead settler had served in the army, navy, or marine corps might be deducted from the time theretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment should be deducted from the time theretofore required to perfect title, without reference to the length of time he may have served; but no patent in any event was to issue until the settler had resided upon, improved, and cultivated his homestead for the period of at least one year after he commenced such improvements and residence. Sec. 2305 simply modified the law previously in force to the extent of allowing a soldier to have deducted from the five years' residence upon the land required under the homestead law the time, not to exceed four years, which he had served in the Union army, navy, or marine corps, and was intended to have no other application. The proviso in sec. 13 of the act of March 2, *supra*, and which is heretofore set out, intended to reserve only such rights as above indicated to the Union soldier, and the proviso which followed intended to operate alike upon all persons who would seek lands in Oklahoma Territory, irrespective of the fact that they were or were not honorably discharged Union soldiers. The intention of Congress, as expressed by the Supreme Court of the United States in Smith *v.* Townsend, *supra*, was "to build a wall around this entire Territory,
36 and disqualify from right to acquire under the homestead law any tract within its limits every one who was not outside of the wall on April 22nd. When the hour came the wall was thrown down, and it was a race between all outside for the various tracts they might desire to take to themselves as homesteads. This law applied to all persons, irrespective of their occupation or condition. To give to the law any other effect would be to give to one class of persons a right not enjoyed by all, which would be abhorrent to our theory of government."

We conclude, therefore, first, that Calhoun disqualified himself from entering or acquiring title to the land in dispute by reason of having entered upon a portion of the lands thrown open to settlement by the act of March 2, *supra*, after the passage of such act and

prior to noon of April 22 following; and, further, that the disqualification exists as to honorably discharged Union soldiers to the same extent as it does to any other citizen.

The judgment of the lower court is affirmed. Justice Scott, having presided at the trial of the cause below, not sitting; the other justices concurring.

37 TERRITORY OF OKLAHOMA:

In the Supreme Court for the Territory Aforesaid.

CALVIN A. CALHOUN, Plaintiff in Error,
vs.
OSCAR H. VIOLET, Defendant in Error. } Petition for Rehearing.

The petitioner, Calvin A. Calhoun, plaintiff in error in the above-entitled cause, asks the honorable supreme court to grant him a rehearing in this case for the mistakes and misapprehensions of both the facts as set out in the petition filed in the court below and admitted by the demurrer filed thereto, and of the law applicable to the facts so set out and admitted, and also for the reason that one of the principal issues, which would be decisive of the case, and the previous decisions of the supreme court of the Territory of Oklahoma and of the United States upon said question and issue of law arising on the facts as set out in the petition below and admitted by the said demurrer of the defendant below and in this court.

The petitioner states that the said misapprehension of facts and law and oversight and failure to pass upon important and controlling questions, all of which were raised by the assignment of errors in said cause by the plaintiff in error and insisted on by his brief filed in the case, there being no oral argument; all of which, in the order in which they arise, the petitioner hereinafter specially sets —, together with the law as it should have been held and applied by the court. The petitioner states that the learned judge who rendered the opinion in said case has misapprehended the decision of the Land Department of the United States cited by him. He also states that the attention of the court was called to both the facts and the law applicable to the facts in the brief filed, and the authorities were cited and called to the attention of the court applicable to said facts, all of which are overlooked or misappre-
38 hended and misunderstood by the court, and the facts misapprehended and mis-tated as well as law; all of which the petitioner herein specially sets out and directs the attention of the court to the same as grounds why a rehearing should be granted.

First. The learned judge in his opinion states the facts as to the qualifications of the plaintiff in error as follows—see page 1 of opinion: "The testimony of Calvin A. Calhoun himself, as quoted by Messrs. Perkins and Chandler, his attorneys, on page 17 and 18 of their brief, shows that he arrived at Oklahoma Station from Arkansas City on Saturday, April the 20th, 1889, after dark, and remained there that night, and left for Arkansas City Sunday morning at 8.30 o'clock; that on his arrival at Oklahoma Station on

Monday, April 22nd, 1889, he went with his son directly to the tent which his son had erected on the land in controversy, and that he, the entryman, leaving his son in charge of the tent and land, went immediately to the Guthrie land office, and arrived there in time to secure homestead entry No. 19 on said land. Mr. Calhoun's own testimony is fatal to his right to make entry of said land or acquire any right thereto."

The first part of said statement, as to plaintiff in error coming to Oklahoma Station on the evening of April the 20th and returning to Arkansas City, is correct, with this addition to it, that he did not come to look after land, but to meet another party; that he, previous to the passage of the law of 1889, had become familiar with the land in that vicinity and needed no information and obtained none, and obtained no advantage whatever, all of which is distinctly alleged and set out in the petition and admitted by the demurrer, and must in passing upon the case be taken as true. See petition for statement.

The latter part of said statement, about arriving at Oklahoma Station on April 22nd and going on the land, the petitioner says is an entire mistake; no such statement is to be found in the petition. Upon the contrary, the petitioner explicitly states in his said petition, and it is admitted by the demurrer, that on the 22nd day of April, 1889, he came from Arkansas City, in the State of
39 Kansas, to Guthrie, not entering the territory to be open- until after 12 o'clock noon of said day; that he remained in Guthrie the rest of the day and made his entry of the land, and did not come to Oklahoma Station until Tuesday, the 23rd, on the train; that he did not know his son was there on the land, and that he had no arrangement with his son to go onto the land in controversy or any other land; all these allegations your petitioner states are specially and distinctly alleged; see petition; that in the determination of this case the petitioner states that the court can alone determine it on the facts as stated in the petition and admitted by the demurrer; that should the court go outside of the pleadings in the case and examine the opinions of the register and receiver of the United States Land Office, the opinion of the Commissioner of the General Land Office at Washington, D. C., and the opinion of the honorable Secretary, the court will find that in all the findings of fact it is found that the petitioner did not come to Oklahoma Station until April 23rd, 1889, and not on Monday, as stated, and the petitioner states that if any such statement is found in the brief referred to it is a mistake, which is corrected by all the opinions and the admitted facts; that the learned judge rendered his opinion disqualifying the petitioner on a misapprehension and mistake as to the facts shown by the pleadings and all the findings; that under the law as defined in the opinion which is as follows: The petitioner is duly qualified to take and hold a homestead when said law as so defined is properly applied to the facts as set out in said petition and admitted by said demurrer. The learned judge rendering said opinion defines the law as follows: "It is well settled that a person who was within the boundaries of the land thrown open to settlement under the act of March 2nd, 1889 (25 Statutes U. S., 1005),

subsequent to March 2nd, 1889, and prior to noon of April 22nd, 1889, and who by reason of having been therein gained an advantage over those who remained outside, is thereby disqualified from acquiring any land thrown open to settlement under the provisions of the act of March 2nd, *supra*."

40 The petitioner states that the foregoing is a fair statement of the law, and that the facts alleged and set out in his petition and the exhibits, which are admitted to be true and must be so treated under the demurrer, clearly show that no advantage whatever was gained or obtained by the petitioner and plaintiff in error, and that he is and was a duly qualified entryman *and* under the law as hereinbefore defined by the court, and it would and must have so found and held but for the aforesaid mistake as to the facts.

Your petitioner would respectfully point out and show to the court that in the decision and opinion rendered in construing and passing upon the rights reserved and saved to honorably discharged Union soldiers by the following proviso in section 13 of the act of Congress of March 2, 1889, which said proviso is as follows: "Provided that the rights of honorably discharged Union soldiers in the late civil war as defined in sections 2304 and 2305 of the Revised Statutes shall not be abridged."

That said proviso of section 13 of said act of Congress, which is in words and figures as follows: "And provided further that until such lands are opened to settlement by proclamation of the President no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto," has been held by the supreme court of Oklahoma, in the case of Smith *vs.* Townsend, not to be a penal provision, but an additional homestead requirement and qualification, and in the same case the Supreme Court of the United States affirmed said decision and concurred in said finding and holding of the supreme court of Oklahoma as to said provision being a qualification; that the petitioner in his brief called special attention of the court to said decision and contended and argued to the court that under the aforesaid decision and holding that to add an additional qualification to honorably discharged soldiers to those required by the aforesaid provisions of the Revised Statutes

41 would be an abridgement of their rights and an express violation of said proviso, which expressly provided against such abridgement, which was entirely overlooked and not noticed or passed upon by the judge rendering said opinion.

The petitioner states that the decision of the supreme court of Oklahoma containing said prohibitory clause of section 13 of the act of Congress of March 2nd, 1889, held as follows:

"It is earnestly contended that the prohibitory clause of the act of March 2nd, 1889, is a penal law and must be construed strictly, but the clause under consideration is not a penal statute. It creates no crime and imposes no penalty. It simply prescribes the qualifications of homestead settlers on the public land mentioned in the act." Vol. 1, Oklahoma Reports, page 126, Smith *v.* Townsend.

The foregoing finding of the supreme court of Oklahoma is affirmed

and approved in the same case by the Supreme Court of the United States, 148 U. S., page —.

The petitioner further states that in construing section 2304 and 2305 of the Revised Statutes of the United States, as to the rights given thereby to honorably discharged Union soldiers, the judge rendering the opinion overlooked and wholly misapprehended the scope and extent of said sections, and the following finding of the learned judge wholly misapprehended the rights conferred by said sections 2304 in that part of his opinion which is as follows: "In the act of Congress of March 2nd, *supra*, we find that Congress intended, in the opening these lands to settlement, to reserve to honorably discharged Union soldiers certain rights which they then possessed under section 2304 and 2305, Revised Statutes of the United States." In section 2304 the right was given to such soldiers to file a declaratory statement for the land, which statement when filed should operate to reserve the land from any other filing for a period of six months. The provisions of this section changed the law previous to its adoption in force to the extent only of permitting a soldier, in person or by his agent, to file a declaratory statement instead of a homestead entry, which declaratory statement
42 should operate to reserve the land for a period of six months, at which time the soldier's right to file his homestead entry therefor —. To that extent only did it change the law previously in force."

The petitioner points out and shows to the court that the foregoing finding and statement of the learned court is a complete misapprehension of said section 2304 and of what rights it confers and what changes it makes of the law as it previously existed as to other classes of persons.

Said section 2304 does not confer the right upon honorably discharged Union soldiers to file a declaratory statement by agent. That right is given in a subsequent section of the act of Congress, section 2309 of the Revised Statutes.

The petitioner further points out and shows to the court that decision entirely misapprehended what changes said section made in the law as it previously existed and what rights it conferred on honorably discharged Union soldiers, and states only the method of securing those rights, overlooking entirely the substantive rights conferred on such soldiers by said sections. The petitioner further shows that the law as it existed previous to the adoption of said section 2304 and the subsequent modifications referred to in said section was as follows—see Revised Statutes of the United States, title, Homestead, page 419, section 2289:

"Every person who is the head of a family or who has arrived at the age of twenty-one years and is a citizen of the United States or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public land upon which such person may have filed a pre-emption claim or which may at the time the application is made be subject to pre-emption at one dollar and twenty-five cents per acre, or eighty

acres or less of such unappropriated public lands at two dollars and fifty cents per acre, to be located in a body in conformity to the legal subdivision of the public lands and after the same have been surveyed."

The foregoing was the only homestead law in force at the time of the passage of said act of 1872 in relation to honorably discharged Union soldiers, of which section 2304 is a part; from 1862, when the act was passed of which section 2289 is a part, amendments were adopted, and the act contains many other sections relating to the method of filing, etc.

43 The petitioner states that said act of 1872, of which said section 2304 is a part, was passed solely for the benefit of honorably discharged Union soldiers, as a reward for their services, and applies to no other class of persons, and said section refers to all subsequent sections of said act as "hereinafter modified," and the modifications follow defining the acts that shall be done and performed to entitle the soldier to a patent; that said proviso in said act of March 2nd, 1889, was intended by Congress and does in express terms, so plain and explicit that no room for construction is left, there being no ambiguity, except the rights granted by said sections from all impairment and abridgement by any provision or part of said act of March 2nd, 1889.

The petitioner further shows to the court that the following rights and privileges were and are expressly conferred upon honorably discharged Union soldiers by said section 2304:

First. "That they shall, on compliance with the provisions of this chapter as hereinafter modified, be entitled to enter upon and receive patent for a quantity of public land, not exceeding one hundred and sixty acres, to be taken in compact form according to legal subdivisions, including the alternate reserved sections of public land along the line of any railroad or other public works not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States, but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvements."

The petitioner states and shows to the court that the primary right is conferred by said section upon the class of persons therein described as a reward for their military services, rendered to the country in the times of its peril and need, to enter upon any of the public lands of the United States not otherwise appropriated and receive a patent for a quantity not exceeding one hundred and sixty acres. This is what section 2304 entitles them to. The residue of the sections and chapter describes the manner in which they shall exercise this right, and the right to enter upon and take one hundred and sixty acres of land in manner as described in said sections and act is the right that Congress provides shall not be abridged. The court has wholly ignored this right and privilege and limits the proviso to one of the mere acts to be done.

44 It denies the right and attempts to limit the intent of Congress as granting and intending to grant only an empty mode of

procedure, mistaking and construing the substance, intent, and purpose of Congress. The case of Smith *v.* Townsend is cited by the court in support of the theory that the provisions of the prohibitory clause of the act of Congress of March 2nd, 1889, applies to all persons, and that honorably discharged Union soldiers are not excepted from its provisions; but the court has also overlooked and misapprehended an important part of that decision of the Supreme Court of the United States, in this: That high court of last resort and the learned and able jurist who delivered that opinion, in discussing the question of whether or not officers of the United States and persons on the right of way in the employ of the railroad passing through the lands to be opened were within the spirit and letter of the prohibition, says: "If Congress had intended to except them or any class, it would have said so." In the case of honorably discharged soldiers it did say so, and expressly provided that their rights as defined by sections 2304 should not be abridged. The decision of the court does take away and deprive them of the main right and privilege granted them, to wit, the right to enter upon and take one hundred and sixty acres and receive, on certain conditions, a patent for the same. The court abridges their right by adding an additional qualification not required by section- 2304 and 2305 of the Revised Statutes of the United States. The language of Judge Brewer in the opinion is as follows, speaking of the intent of Congress: "It must be presumed to have known that on the right of way were many persons properly and legally there; it must also have known that many other persons were rightfully in the Territory as Indian agents, deputy marshals, mail-carriers, and many others, and if it intended that these parties, thus rightfully in the Territory on the day named, should have special advantage in the entry of tracts they desired for occupancy, it would have been very easy to have said so."

The petitioner says and shows to the court that under section-
2304 and 2305 special rights and privileges were given to
45 honorably discharged soldiers, for the reasons hereinbefore
stated, not given to any other persons, and intended to give to such soldiers, and did so give, the right to enter upon and homestead, in the special manner set out, on any class of public lands owned by the United States and not otherwise appropriated, one hundred and sixty acres of such lands; and Congress does say by the proviso aforesaid that none of their rights shall be abridged, leaving the right so granted unaffected by the act of Congress of March 2nd, 1889, and to be exercised in manner as provided in said sections 2304 and 2305. The petitioner states that the decision rendered in this case wholly nullifies and disregards the exception made by Congress and the rights of such soldiers, and wholly overlooks the provisions of the aforesaid sections, and attempts to virtually repeal and limit said proviso and wholly misconstrue *its* scope, effect, and purpose thereof.

The petitioner points out and shows that the court erred and overlooked the direct decision of the Supreme Court of the United States as to the office and effect of provisions, said decision and

numerous other authorities being cited in the brief of petitioner and plaintiff in error, but were either overlooked or ignored in said decision, and the decision is contrary to the current of authorities and the decisions of the Supreme Court of the United States. In the case of Lysander *vs.* Bobbitt *et al.*, 1 Black, U. S. R., page 55 to 62, which defines the office of a proviso in an analogous case, where it was intended to apply to a certain class of persons as in the case under consideration, the Supreme Court say: "We are of opinion that the proviso referred to is not limited in its effect to the section where it is found, but that is was affirmed by Congress as an independent proposition and applies alike to all officers of this class."

So in this case the proviso is an independent proposition, preserving all the rights of the class of persons named therein from being in any manner limited or abridged by anything contained in said act of March 2nd, 1889, and left the rights of such persons unimpaired under the aforesaid sections of the law of 1872 given-
46 honorably discharged soldiers, in consideration of their services, the rights and privileges therein enumerated.

The petitioner states that the court erred and misapprehended the law in its definition of the office and purpose of a proviso and in holding that it only related to the portion of the act which preceded it. The learned judge cited section 233 of Sutherland on the Construction of Statutes, but wholly overlooked sections 273, 275, 218, 222, 225, cited and called to the attention of the court in brief of plaintiff in error, where the effect and limitations of provisos are fully discussed and numerous decisions of the courts referred to by the same author and in the same volume. The honorable judge rendering the opinion entirely overlooked the qualifications to the general proposition he lays down, and entirely overlooked the relation of the proviso referred to and its purpose. Black on Interpretation of Law, page 271, title, Proviso, says: "The office of a proviso is not to enlarge or extend the act or the section of which it is a part, but rather to put a limitation upon the general words the legislature has employed," and cites the matter of Weble, 24 Howard's Practice, 247. In this case the proviso limits the provisions of section 13 of the act of March, 1889, from having any application to honorably discharged soldiers such as described in sections 2304 of the Revised Statutes—that is its sole purpose in the section of which it is a part—and it applies to all their rights and not, as the learned judge claims, to one single provision relating to the mode of exercising their rights. Black on Construction of Laws, discussing the office of a proviso and its relation to what preceed-s and what follows, says: "Hence the proviso may qualify the whole or any part of the act or it may stand as an independent proposition or rule if such is clearly seen to be the meaning of the legislature as disclosed by an examination of the entire enactment," and refers to the case *supra*, United States *vs.* Bobbitt *et al.*, 1st Black, page 55.

The petition states that the only purpose and object of said proviso, when considered in connection with the entire act of March
47 2nd, 1889, is to restrain and limit said act from in any manner affecting or abridging the rights of the class of persons

mentioned, as defined by the aforesaid sections of the Revised Statutes of the United States, and from *applying* any of the additional qualifications and prohibitions of said act from being applied to honorably discharged Union soldiers; that the court in its decision has wholly misunderstood and misconstrued the law.

The learned judge misapprehended and misstates the purpose of said proviso in saying it was only intended to preserve certain rights; there are no words of limitation in said proviso; it clearly says, all rights as defined by sections 2304 and 2305 of the Revised Statutes. In the language of Judge Brewer, if Congress had intended it to apply only to the matters enumerated by the learned judge, it would have said so by naming them. The learned judge in his opinion said, to give the law any other construction than that given by him would be to give one class of persons a right not enjoyed by all, which would be abhorrent to our theory of government.

Under this theory the entire act of 1872 and all pension laws would be abhorrent and void, as they were intended and do give to Union soldiers certain rights as a class not given to all. This is the purpose and object of the law, to give them these special rights as a reward for their services and sufferings and disabilities incurred in the service of their country. We respectfully contend that laws giving such special rights and privileges commend themselves to all who duly consider them as based on justice and right and are calculated to inspire feelings of patriotism and love of a nation dealing thus with its citizen soldiers.

In all the foregoing particulars, as well as many others, we respectfully insist that the court has misunderstood and misapplied the law, and that said decision is contrary to the law and equity and right of the case and based on a misconception of the rules of interpretation applied to the construction of statutes; on a misapprehension of the allegations of the petition, which must be
48 taken and treated as true under the demurrer, and a misunderstanding of the law applicable to the facts as admitted in the particulars hereinbefore stated.

Wherefore the petitioner asks that a rehearing be granted and an opportunity given to further brief and orally argue the questions involved.

AMOS GREEN & SON,
Attorneys for Petitioner.

Endorsed: Case No. 435. Calvin A. Calhoun *vs.* Oscar H. Violet. Petition for rehearing. We acknowledge service of a copy of the within petition. Sept. 21st, 1896. Douglas & Douglas, attorneys for Violet. Filed Sept. 22, 1896. Edgar W. Jones, clerk supreme court. Amos Green & Son, attorneys for petitioner.

49 CALVIN A. CALHOUN, Appellant,
v.
OSCAR H. VIOLET, Appellee. } #435.

And now, to wit, on this the eleventh day of January, A. D. 1897, the above cause having come on for decision upon a motion for rehearing, and the court being fully advised in the premises, it is therefore considered, ordered, and adjudged that the said motion be, and the same is hereby, denied. Exception to this ruling is taken by counsel for appellant, and sixty days' time is given in which to prepare an appeal to the Supreme Court of the United States.

50 TERRITORY OF OKLAHOMA:

In the Supreme Court of said Territory.

CALVIN A. CALHOUN, Appellant,
vs.
OSCAR H. VIOLET, Appellee. } In Equity. Petition.

The above-named appellant, conceiving himself aggrieved by the judgement, orders, and decree made and entered in the above-entitled cause by the supreme court of the Territory of Oklahoma, for the reasons specified in the assignment of error filed and in the petition for a rehearing and the assignment of error filed, herewith prays that he may be allowed an appeal to the Supreme Court of the United States, and that a transcript of the record and proceedings and exhibits upon which said order, judgement, and decree were made, duly authenticated, may be certified to the Supreme Court of the United States, District of Columbia.

FRED BEALL AND
AMOS GREEN & SON,
Attorneys for Appellant.

The foregoing petition of appeal is allowed August 26th, 1897.

FRANK DALE,
Chief Justice Supreme Court, Territory of Oklahoma.

51 Filed Aug. 26, '97.

EDGAR W. JONES,
Clerk Sup. Court.

52 UNITED STATES OF AMERICA:

Supreme Court of the United States.

CALVIN A. CALHOUN, Appellant,
vs.
OSCAR H. VIOLET, Appellee. } Assignment of Error.

And now comes Calvin A. Calhoun, appellant, and says that in the decree, judgement, and orders made in the above-entitled cause, in the supreme court of the Territory of Oklahoma, many and

manifest errors have intervened to the great prejudice of the rights of the appellant, and that said decree, judgement, and rulings are erroneous for the following reasons:

First. The court erred in sustaining the demurrer interposed to the petition of the appellant and in holding that said petition did not state facts sufficient in law to constitute a cause of action against the appellee.

Second. The court erred in holding that under the facts as stated in said petition and admitted by the demurrer thereto that appellant was disqualified to take and hold a homestead in the lands opened to homestead settlement, in the Territory of Oklahoma, under the acts of Congress of March first and March second, 1889.

Third. The court erred in holding that the additional qualification provided for in section thirteen of the act of Congress of March second, 1889, defining the qualifications of persons authorized and qualified to take homesteads under the provisions of said act of Congress of 1889, applied to honorably discharged Union soldiers, as defined in section 2304 and 2305 of the Revised Statutes of the United States, which were and *an exception* by an express proviso in said section thirteen of said act of Congress; which said proviso is as follows:

"And provided further that the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes shall not be abridged."

Fourth. The court erred in holding that any entry for any purpose into the Territory to be opened to settlement under the act of Congress of March 2nd, 1889, after the passage of said act and prior to twelve o'clock noon of April 22nd, 1889, disqualified forever the person so entering from taking and holding at any time a homestead in any of said lands.

53 Fifth. The court erred in stating the facts set out in the petition of the appellant and the law applicable to the facts as set out in said petition and admitted by the demurrer.

Sixth. The court erred in holding and ruling that appellant lost all his rights to the land because the appellant was forced by the mistaken and illegal order, issued by the Commissioner of the General Land Office under the erroneous opinion that the North fork of the Canadian river was a meandered stream, and requiring appellant to relinquish the land on one side or the other of said stream under penality of having his entry cancelled, which relinquishment, as the petition shows, was made under protest of appellant, and as soon as the error was discovered the appellant filed his application to set aside said forced, illegal, and mistaken relinquishment and reinstate appellant's filing and entry, which application was still pending and undisposed of in the Land Department when the register and receiver of the United States land office at Oklahoma City permitted the appellee to make entry of the land, said appellee at the time having full notice of all the facts.

Seventh. The court erred in applying the law to the facts as set out in appellant's petition.

Eighth. The judgement and decree of the court below is contrary to the law, equity, and facts of the case.

Wherefore the appellant prays that the judgement, rulings, and decree of the court below be reversed, set aside, and vacated, and for all other and further relief.

FRED BEALL, *Attorney.*
AMOS GREEN & SON,
Of Counsel for Appellant.

54 Filed Aug. 26, '97.

EDGAR W. JONES,
Clerk Sup. Court.

55 TERRITORY OF OKLAHOMA:

In the Supreme Court of the Aforesaid Territory.

CALVIN A. CALHOUN, Appellant,
vs.
OSCAR H. VIOLET, Appellee.

Know all men by these presents that Calvin A. Calhoun, as principal, and Frank Menton and J. W. Evarts, as sureties, are held and firmly bound to the officers of the courts and the appellee to pay all costs which may accrue in the above-entitled case should said appellant fail to prosecute his said appeal with effect and which may be adjudged against said appellant; for the payment of which we bind ourselves and each of us, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this —day of March, 1897.

The condition of the above obligation is such that whereas the above-bounden Calvin A. Calhoun has prosecuted an appeal to the Supreme Court of the United States to reverse a judgement and decree rendered in the above-entitled case by the supreme court of Oklahoma Territory, now if the said Calvin A. Calhoun shal

56 prosecute said appeal to effect and pay all costs if he fail to make said appeal good, then this obligation shall be void otherwise to remain in full force and effect.

CALVIN A. CALHOUN. [SEAL.]
F. MENTON. [SEAL.]
J. W. EVARTS. [SEAL.]

57 TERRITORY OF OKLAHOMA, } *ss.*
County of Oklahoma, }

In the Supreme Court of the Aforesaid Territory.

CALVIN A. CALHOUN, Appellant,
vs.
OSCAR H. VIOLET, Appellee.

I, Frank Menton, being first duly sworn, on oath says that he is worth, and reasonably worth, the sum of three hundred dollars over and above all just claims, liabilities, debts, and exemptions; that

affiant's property consists of following: Merchandise at Oklahoma City.

FRANK MENTON.

Subscribed and sworn to before me this 8 day of March, 1897.

[Seal County Clerk, Oklahoma County, Okla. Ter.]

R. F. CAFFREY,
County Clerk.

58 TERRITORY OF OKLAHOMA, } *ss:*
County of Oklahoma, }

In the Supreme Court of the Aforesaid Territory.

CALVIN A. CALHOUN, Appellant, }
vs.
OSCAR H. VIOLET, Appellee. }

I, J. W. Evarts, being first duly sworn, on oath says that he is well and reasonably worth the sum of three hundred dollars over and above all just claims, liabilities, debts, and exemptions; that affiant's property consists of the following: Real estate in Oklahoma City, O. T.

J. W. EVARTS.

Subscribed and sworn to before me this 9 day of March, 1897.

[Seal County Clerk, Oklahoma County, Okla. Ter.]

R. F. CAFFREY,
County Clerk.

59 Filed and apro. Aug. 26, '97.

EDGAR W. JONES,
Clerk Supreme Court.

60 UNITED STATES OF AMERICA, *ss:*

United States Supreme Court.

To Oscar H. Violet, appellee, Greeting:

You are hereby cited and admonished to be and appear at and before the United States Supreme Court, at Washington city, District of Columbia, in 30 days next after the service of this citation, to answer an appeal taken and filed in the clerk's office of the United States Supreme Court from the supreme court of the Territory of Oklahoma, wherein Calvin A. Calhoun was plaintiff in error and you were defendant in error, to show cause, if any there be, why the judgement rendered against the said plaintiff in error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 26th day of August, in the year of our Lord one thousand eight hundred and ninety-seven, and the Independence of the United States of America one hundred and twenty first.

FRANK DALE,
Chief Justice Supreme Court
of the Territory of Oklahoma.

Service hereof hereby accepted October 4, 1897.

DOUGLAS & DOUGLAS,
Att'ys for Appellee.

61 Filed Aug. 26, '97.

EDGAR W. JONES, *Clerk.*

62 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Edgar W. Jones, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the above and foregoing is a full, true, and complete transcript of the record in a case therein, entitled Calvin A. Calhoun, plaintiff in error, *vs.* Oscar H. Violet, defendant in error, as the same appears of record and on file in my office.

In testimony whereof I have hereunto subscribed my name and caused the seal of the said court to be affixed, at my office, on this the — day of August, A. D. 1897, and of the Independence of the United States of America the one hundred twenty-second.

[Seal Supreme Court, Territory of Oklahoma.]

EDGAR W. JONES,
Clerk of the Supreme Court.

Endorsed on cover: Case No. 16,691. Oklahoma Territory supreme court. Term No., 180. Calvin A. Calhoun, appellant, *vs.* Oscar H. Violet. Filed October 11, 1897.

No. 180.

Brief of Calhoun

Filed Sept. 16, 1898.

Office Supreme Court U. S.
FILED
SEP 16 1898
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 180.

CALVIN A. CALHOUN,
Appellant,
vs.
OSCAR H. VIOLET,
Appellee.

In the Supreme Court of the United States.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

(16,691.)

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 180.

CALVIN A. CALHOUN,
APPELLANT,
vs.
OSCAR H. VIOLET,
DEFENDANT.

IN THE SUPREME COURT OF THE UNITED STATES.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

STATEMENT OF FACTS, BRIEF AND ARGUMENT.

This is an action in equity brought by Calvin A. Calhoun, plaintiff and appellant, against Oscar H. Violet asking to have a resulting trust declared to his use and benefit, vesting in him the title and right to the land described in his petition filed in the Court below. The final certificate and patent, through error in the proceedings by the officials of the Land Department, were issued to the defendant, Oscar H Violet, when in equity and under a proper application of the law to the facts as established by the evidence they should have been issued to the plaintiff. By a mistake of the commissioner of the general land office plaintiff was required to relinquish his entry upon Lot 10, containing 16¼ acres and an essential part of his original homestead entry; and the defendant was

allowed to enter the same, and finally the patent was issued to him in violation of the plaintiff's right in the premises. The plaintiff sets out the following facts in his complaint as a cause of action against the defendant to which the defendant enters a general demurrer. First, that plaintiff is a legally qualified entryman; Second, that he has not had the benefit of his homestead right; Third, that he is an honorably discharged union soldier who served more than ninety days in the late civil war and has remained loyal to the government since his discharge. Fourth, that on the 23rd day of April, 1889, he made entry of lots 6, 7, 8, 9, and 10, Sec. 3, Township 11, N. R. 3 west of 2 M., at the Guthrie land office, I.T. (now Oklahoma) and paid the required fee and commission for said entry. Fifth, that he made said entry under the provisions of the Soldiers' Homestead Act of June 1872; made the required affidavit, form 4065, and filed a certified copy of his service in and discharge from the army with his homestead entry. Sixth, that on the evening of April 23, 1889, he made settlement on said land and has resided thereon up to the present time. Seventh, that he has complied with the requirements of the homestead laws in every respect, and has cultivated and improved the land to the extent in value of one thousand dollars Eighth, that on the 24th day of February, 1890, he received notice through the local land office at Guthrie, O. T., that his entry was suspended for the reason that his land laid on both sides of a meandering stream, to-wit: lot 10 on the south side and lots 6, 7, 8 and 9 on the north side of the north fork of the Canadian river, and that within 30 days he must elect on which side he would relinquish his claim to the land, and that in case he failed or refused his whole entry would be held for cancellation; a copy of said order is attached to plaintiff's petition. Ninth, that on the 17th day of March, 1890, and within the 30 days, plaintiff filed his relinquishment of said lot 10 in the land office at Guthrie, under protest, both written and verbal, and on the following day, March 18th, defendant made his entry of said lot No. 10.

Tenth, that in 1891 the Secretary of the Interior reversed the ruling of the commissioner and held that the North Canadian river had been improperly held to be a meandering stream, and that a homestead can be legally, held a part of which lays on opposite sides of said river. Eleventh, that on the 15th day of May, 1893, and long before the final receipt was issued to the defendant plaintiff filed in the local land office at Oklahoma City, O. T., a motion or application asking for reinstatement of his entry upon said lot—a copy of which is attached to plaintiff's petition. Twelvth, that plaintiff's application asking for reinstatement of his entry was overlooked and never acted upon by the commis-

sioner of the land office, and the final receipt and patent was issued to the defendant in violation of plaintiff's right to and equity in said land. Thirteenth, that defendant had full knowledge of plaintiff's claim upon said lot and of the fact that he relinquished his right under protest, and in compliance with an order issued by the commissioner of the land office threatening to hold his whole entry for cancellation in case he failed to relinquish within the 30 days allowed. Fourteenth, that the lots 6, 7, 8 and 9, on the north side of the said river only contain about 132 acres of land, 28 acres less than plaintiff is entitled to enter as a homestead. Fifteenth, that prior to the opening of Oklahoma Territory to settlement, in the spring of 1888, plaintiff worked for the Santa Fe railroad company as a carpenter on their line through Oklahoma Territory and was acquainted with the land in the vicinity of Oklahoma Station, near where the land in controversy is located. Seventeenth, that on the 20th day of April, 1889, plaintiff was at Arkansas City, in the State of Kansas, and that on the afternoon of that day he took the south bound passenger train on the Santa Fe railroad and visited Oklahoma,a Station, on said railroad within Okahoma Territory, arriving at the station after dark in the evening: stayed there over night and until about 8 o'clock the next morning, April 21st, when he took the north bound passenger train and returned to Arkansas City, and remained there until the Santa Fe passenger train left for the Oklahoma opening on the morning of April 22nd and entered the Territory with the crowd, after 12 o'clock, and stopped at the Guthrie land office and succeeded in making his entry in the afternoon of April 23rd, and the same evening went to Oklahoma Station near where the land entered is located and made settlement thereon. Eighteenth, that the whole claim is of the value of twenty-five thousand dollars. These are the facts substantially as they occurred, and as they are set out in plaintiff's petition and admitted by defendant's demurrer.

ERRORS OF THE COURT

(The errors of the Territorial Court are not fully set out on pages 29 and 30 of the printed record; we therefore state fully what we regard as errors in the opinion.)

The court errs in failing to state fairly and fully the facts as set out in plaintiff's petition, and in not considering the questions of law presented by plaintiff's attorneys as they are clearly stated in his brief, petition, and motion for a rehearing, much of which will be found in the printed record.

The comments of the court are uniformly against the plaintiff. The

court finds that plaintiff relinquished under the directions contained in the commissioner's letter, but say nothing about his relinquishment being made under protest, both written and verbal; facts which are set out in plaintiff's petition and acknowledged by defendant's demurrer.

Second, the court finds that immediately upon Calhoun's relinquishment that Violet filed a homestead upon lot 10 and on December 29, 1893, made final proof. The court here mentions the fact that plaintiff had filed an application for reinstatement on May 5, 1893. seven and one-half months prior to the time of Violet's final proof, and also that in the mean time it had been decided that the order requiring Calhoun's relinquishment for said lot 10 was erroneous. Here again the court comments saying: "No appeal was taken from the order requiring the relinquishment and no steps appear to have been taken by him to have his entry reinstated from the time of his relinquishment until he filed his application to be reinstated." The court wholly fails to consider the legal effect of filing the application for reinstatement. Third, the court comments upon the contests filed against the plaintiff and the final cancellation of his entry for the land on the north side of the river, and quotes the Secretary's misstatements of the evidence in the case, as stated by Perkins & Chandler plaintiff's attorneys. The court mistakes the conclusions of the Secretary for the finding of facts which must stand as conclusive against the plaintiff, notwithstanding the facts as testified to by plaintiff and stated by his attorneys, are set out in full in plaintiff's petition and appear on page 6 of the printed record and are admitted by the demurrer. The court closes its eyes against the facts and evidence favorable to the plaintiff. The plaintiff further alleges that neither the Commissioner of the General Land Office nor the Secretary reviewed the evidence, or considered the legal questions involved in his case which is admitted by the demurrer. Yet the court fails to notice or even give to it the cold respect of a passing glance. The court erroneously holds that the findings of the Secretary, although admitted to be erroneous, are conclusive against the plaintiff. Fourth, on page 16 is a model specimen of the apparent bias of the court. It says: "We think the laws properly applied to the facts as found by the land department is sufficient upon which to base a finding that Calhoun was disqualified to enter land." Here the court injects a condition that does not exist in this case. It says, "that it is well settled that a person who was within the boundaries of the land therein open to settlement under the act of March 2, 1889, and who by reason of having been therein gained an advantage over those who remained outside is thereby disqualified from acquiring any land. Here the court seems to assume that the evidence

shows, and that the officers of the land department found that the plaintiff gained an advantage by being in the Territory during the interval between March 2nd and April 22nd, neither of which is true—there was no such charge made in any of the contest complaints nor no evidence offered to prove advantage and no such findings by the Secretary. But if it had been known by the contestants that the question of advantages would cut any figure in the case the charge would have been made and the proof no doubt would have been furnished. However, we object to the court supplying the unknown and omitted necessity.

There is not a word of favorable comment in the whole decision for the plaintiff The facts set up in the petition and admitted are ignored. The questions of law presented by his attorneys are passed without comment, and no despot of the past, that we have any knowledge of, has ever assumed a more arbitrary power. Fifth, on same page near bottom of page, the court admits that if the old soldier is exempt from the prohibition, that the plaintiff is not disqulified, and then proceeds to misquote and misconstrue the proviso in the act of March 2, 1889, which declares that the honorably discharged Union Soldior shall not be disqualified. Sixth. the court errs in holding that the unniversally accepted rule of construction is that the natural and appropriate office of a proviso is to restrain and qualify some matter which precedes the proviso and should be so confined. But if the court is correct in this, it will be remembered that the act of March 1st precedes the soldier proviso, and according to the court's theory supercedes it; and the act of March 2nd does not justify the court's or the land department's construction of the law We don't believe that the decision in the Smith-Townsand case could have been as it is without considering the act of March 1st as indicating the intention of c ongress. Seventh, the court errs in holding that the right to file a declaratory statement is given the soldier in Sec 2304 of the revised statutes This right is merely referred to in Sec. 2304, and the right to file a declaratory either in person or by agent is guaranteed in Sec. 2309 of the same chapter. This is a material error for the reason that the court holds that congress only intended to reserve this right by inserting the proviso. It was wholly unnecessary to insert the proviso for that purpose, but if it had been the intention of congress to secure only this right it evidently would have said as provided for in Sec. 2309 instead of Sec. 2304 unless we assume also that congress, like the court, did not know the section that provided for this right Eighth, the court errs in holding that other provisions of Sec 2304 changed the law previous to it's adoption in force, to the extent only of permitting a s ldier in person, or by agent to file a declaratory state-

ment in place of a homestead entry. Prior to the passage of the Soldier's Homestead act of June 8, 1872, all homesteaders within what was known as the Railroad Land Grant Limit were only allowed 80 acres. The act of June 8, 1872, known as the Soldier's Homestead Act gave to the honorably discharged Union soldier the right to homestead 160 acres of any public land subject to homestead entry, and not otherwise appropriated, while all other homesteaders were limited to 80 acres within the railroad limit until the act of March 3, 1879. Thus for seven years the ex-Union soldier enjoyed a privilege not enjoyed by other homestead settlers, as a reward for his services and loyalty to his country. The The Honorable Justices of our Oklahoma Supreme Court say that such a law as this is abhorrent to our theory of government —Page 20 printed record. Nineth, the court accepted the judgment in the Smith-Townsand case to the effect that it was a race between all outside the Territorial line at 12 o'clock on the day of opening for the various homesteads in the Territory, but errs in failing to notice the admitted fact that the plaintiff was one of those outside the line and one that made the race with others for his homestead. Tenth, the court errs in denying plaintiff a rehearing without considering the legal question presented in his petition. Eleventh, the court closes its decision with the crowning error in the opinion holding that plaintiff disqualified himself by entering upon a portion of the land thrown open to settlement by the act of March 2, 1889, after the passage of said act and prior to noon of April 22 following, and further, that the disqualification exists as to honorably discharged union soldiers to the same extent as it does to any other citizen. Thus holding squarely against nearly all the decisions of the land department that a simple entry into the Territory disqualifies the plaintiff.

ARGUMENT

Plaintiff's was one of the first cases tried at the Oklahoma City land office and at a time when it was erroneously held that any entry into the Territory between March 2, and April 22, 1889, disqualified. It is upon plaintiff's admitted entry into the Territory on April 20, as a passenger on the Santa Fe railroad that the demurrer was sustained, the court holding that this entry into the Territory disqualified him, and hence he had no cause of action The defendant relies upon this, insisting that by his own admission, the plaintiff disqualifies himself. The defendant in his brief before the Territorial Supreme Court presented two questions of law. First, that plaintiff by failing to appeal from the order of the commissioner lost his right to a further hearing. Second, that plaintiff has never litigated the title to this land in the land department and

therefore will not be heard in a court of equity. In part we reply to this, that defendant should not be heard upon these questions under his general demurrer, which is sustained wholly on the ground that plaintiff is disqualified. However, plaintiff did litigate so far as he could under the circumstances the title to this land in the land department by filing his motion for reinstatement of his entry, which has not yet been acted upon, and properly disposed of by the land department, and under the rules of practice before the land department, it had the same legal effect as an appeal and reserved the land from other disposition while pending.

The defendant stands upon his demurrer and can not rightfully raise any ulterior matter as a defense. He must stand or go down with the demurrer. The points raised are both questions that can be explained away by the introduction of evidence. If the defendant had filed an answer we could have filed the original copy of the notice from the land office requiring the plaintiff to relinquish, showing that he had no notice of right of appeal. The rules of practice in the land office requires this notice to be given. And the rules of practice before the land office governs the proceedings, while the case is before the land department, under rule 81—rules or practice before the land office, no appeal is allowed from interlocutory orders and decisions of the commissioner, and under rule 48, fourth paragraph: in cases where appeals are allowed if it is not shown that the party against whom the decision was rendered, was duly notified of his right of appeal, the case will be reopened. It devolves upon the defendant to show that due notice was given the plaintiff of his right of appeal, defendant's demurrer deprived plaintiff of his right to amend his petition and show that notice of his right of appeal was not given. The probable reason for not giving this notice is the fact that there is no appeal from orders of this character. In support of our claim we further cite 5th L. D. 377 to 380, 11th L. D. 191, 12th L. D. 235 and 684 and rule 66 second paragraph, rules of practice before the land department. Plaintiff's application for reinstatement reserved the land from other disposition until acted upon and properly disposed of. In support of this claim we cite 15th L. D. 569 to 571; "an application for reinstatement of a cancelled entry while pending operates to reserve the land covered thereby from other disposition." If there is any thing settled in the practice of the land department it is the rule that a relinquishment is void or voidable if made under duress, or not voluntarily made, or if made by mistake or through a misaprehension of the law. In support of this proposition we cite 2nd L. D. 135, 4th L. D. 281, 7th L. D. 470-471, 8th L. D. 194

10th L. D. 569, 15th L. D. 569, 16th L. D. 353-355, 14th L. D. 396. In all these cases the doctrine is clearly stated that a relinquishment not freely and voluntarily made is not binding on the relinquishor, and that on application and a proper showing the entry will be reinstated. Plaintiff alleges that as a matter of fact his relinquishment was not voluntarily made, and defendant by his demurrer admits it to be true. This seems to leave no question as to plaintiff's right at that time to a hearing before the Land Department upon his motion for reinstatement. The contention of the defendant that plaintiff lost his right by not appealing from the commissioner's order is not the law. Plaintiff was not bound to appeal, either way was open to him in the Land Department, to appeal or file an application for reinstatement. There is no appeal from an interlocutory order of the commissioner, and there was no notice given the plaintiff of his right of appeal. His application for reinstatement was doubtless the proper proceeding in the land office and reserved the land from other disposition. Plaintiff had a right at that time to a hearing before the Land Department upon his motion for reinstatement which he failed to secure, through no fault of his own, but because the land office officials did not do their duty. As we have said before, the defendant should not be heard upon these outside questions. Though they do not affect plaintiff's right to the land, they are not in harmony with his demurrer, and he does not rely upon them. He relies upon plaintiff's admitted entry into the Territory on April 20, 1889. This is in fact the only question in the case. If plaintff is a qualified entryman, he is entitled to the land, and he is a qualified entryman, unless his entry into the Territory on April 20 as herein before stated disqualified him. We will now discuss the question of plaintiff's qualification and right to a homestead in the Oklahoma Territory. The striking down of a citizen by depriving him of his just and lawful rights, by a judicial or any other arbitrary decree is a serious matter and goes to the foundation of civil goveramen.—a government that does not deal justly with its citizens has no excuse for existence. Our fathers started out with a grand declaration of human rights in 1776. We, again, while suffering from the results of a fratracidal war put into our constitution in 1865, just 90 years after the original declaration of human rights, the 14th amendment which declares, among other things, that no state shall deny to any person within its jurisdiction the equal protection of the laws. In this the United States government undertakes to place all citizens upon an equality before the law and to protect them in the exercise of such rights and privileges. This is what the plaintiff in this case is before the court asking, and to show the court that he has not

received just treatment and that the law has not been construed and applied in his case the same as it has been construed and applied in other similar cases. We refer the court to the Curnut-Jones case 21st L. D., page 40, and the cases there cited. These decisions of the department show that as a rule from the start in Oklahoma cases it was not held that any entry into the Territory during what was called the inhibited period disqualified, unless it was shown that some advantage was gained by such entry. In the case here cited, Mr. Jones lived close to the Oklahoma line and went into the Territory and to Oklahoma Station on the Santa Fe railroad frequently during the prohibited period, was well acquainted with the lands and had placed a foundation for a building on the land he intended to take for his homestead when the land was open to settlement. The foundation was put there before the act of March 2nd was passed and Mr. Jones made the run from the line to his claim after 12 o'clock, noon, April 22, 1889. It is held that he gained no advantage and was not disqualified. The plaintiff's case differs from the Jones case only in the fact that plaintiff was only in the Territory one time and had no foundation or any thing else on the land he intended to enter and that he went to the land office and made his entry in place of going to the land to make a settlement. Plaintiff took the chances of some one making a settlement on the land before he made his entry. There was but one out of the half dozen contestants he had that claimed a prior settlement. That was one Theodore W. Echelberger, who was on the Santa Fe railroad company's right-of-way, within a few feet of the west line of the claim, at and before 12 o'clock on the day of opening. He is long since out of the contest and is now dead. The decisions of the land department since the Curnutt V. Jones case, have been uniform, in holding that where a party gained no advantage by being in the Territory during the inhibited period and made the run from the line after 12 o'clock on April 22 is not disqualified. This is precisely our case and we ask the court to place us on an equality with Mr. Jones and the many others who have been given their land under similar circumstances. We refer the court to one or two late decisions: 25th L. D. page 273, Jackson et. al. vs Garrett (Syllabus): "Presence within the Territory during the inhibited period does not operate as a disqualification if no advantage is gained."

Devore vs. Riehl, page 380 22, A settler on leased land goes out after proclamation was issued opening the Cherokee Strip to settlement. These lands were opened to settlement in persuance of the act of Congress approved March 2, 1889, and this party had been living on leased land, within the Cherokee Strip, and was living there at the time the

President's proclamation was issued opening the same to settlement, and went out after the proclamation was issued He made the run from the line on the day of the opening to the land he undoubtedly had selected before, yet it is held that he gained no advantage and is not disqualified. We refer the court to one more case in 23rd L. D., pages 63 to 65, Heiskell vs. McDowell where both of the contestants had been within the Territory during the prohibited period and it is held that they are not disqualified thereby. We deem it unnecessary to refer further to these decisions; we have only referred to them to show the court that we have not received fair treatment in the Land Department In addition to the above our application for reinstatement was ignored by the commissioner of the land office (or overlooked) and the Hon. Secretary of the Interior misquoted our Attorney's statement of the evidence and the facts as stated by them in their brief before him, and formed his conclusions and rendered his decision on his misstatements and mistakes.

This is a double error of the Secretary First, in not reviewing the evidence in the case and forming his opinions from that, in place of taking the statements of the attorneys in their brief as a basis for his opinion. Second, in misquoting the evidence as stated by plaintiff's attorneys. The court is, no doubt, fully advised on all the points we may present, but nevertheless we desire to go as fully and as deeply into the merits of the case, and to a proper application of the law to it as a prudent use of valuable time will permit. On the first day of March, 1889, the act of Congress ratifying and confirming the agreement and articles of cession relating to the Creek or Muskogee Indian lands in Oklahoma Territory was approved. It applied to the lands laying between the south line of what was known as the Cherokee Strip and the North Fork of the Canadian river, about two-thirds of the land open to settlement at that time Sec. 2 of this act provides that these lands shall be a part of the public domain. Shall only be disposed of in accordance with the laws regulating homestead entries. That Sec. 2301 of the revised statutes shall not apply, and that any person who may enter upon any part of said lands prior to the time the same are opened to settlement by act of Congress shall not be permitted to occupy or to make entry of such lands, or lay any claim thereto. This act provides for the opening of these LANDS TO SETTLEMENT BY ANOTHER AND FINAL ACT OF CONGRESS SOME TIME IN THE FUTURE. Sec. 2 shows that Congress used the word occupy in its ordinary signification, and that it was understood that a person simply passing over the land or in and out of the Territory was not occupying any part of it, because they say that if you enter upon it you will not be permitted to occupy or

make entry of it. The Land Department in preparing the affidavit that all entrymen were required to make before being allowed to make entry, recognized the act of March 2nd as being the law governing the opening of these lands to settlement. Here it is: "I, John Doe, applying to enter a homestead do solemly swear that I did not enter upon and occupy any portion of the lands opened to entry and settlement in the President's proclamation dated March 23, 1889, prior to 12 o'clock, noon, of April 22, 1889."

We therefore insist that Sec. 2 of the act of March 1, 1889, is no part of the law governing the qualification of entrymen in the Oklahoma country. It seems manifest from the language used and the circumstances under which it was enacted, that this prohibitory clause was only intended to prevent any settlement upon these lands prior to the time they were opened to settlement, this appears to be all that was necessary at that time and all that was intended. Enter upon has a different meaning from entering. It is indicated by the words "enter upon any part of said lands," which means settlement upon any part of said lands prior to the time the same are opened to settlement by act of Congress. "Shall not be permitted to occupy, or make entry of, or lay any claim thereto;" in other words, if they settle upon them they will not be permitted to enter and occupy them. Meaning that part or tract settled upon in violation of law. Here we desire to call the attention of the court to the fact that the act of March 2nd contains a provision, not in the act of March 1st, to the effect that no person entering upon and occupying these lands shall ever be permitted to enter any of said lands. The difference as will be observed is that the act of March 1st deprives the illegal settler of the right to acquire title to the land he settles upon, while the act of March 2nd deprives him of the right to ever acquire title by entry to any of said lands. Settle as an intransitive verb—means to repose to rest; upon means resting or being upon a hill or upon a field or homestead. At the time of the passage of the act of March 1st it was not known when these lands would be opened to settlement, and so far as the legislators knew it might have been a number of years. It is not reasonable to suppose that it was intended to disqualify every person who passed through or went into the Territory during the time that might elapse before these lands were opened to settlement. However, on the following day, March 2nd, another act was approved that was passed by the same legislative body that passed the act of March 1st; this was the final act provided for in the act of March 1st and superceded it by taking its place in regulating the disposal of the Creek or Muskogee lands which Sec. 2 of the act of March 1st related

to. Sec 2 was only in force one day when it was wholly superceded by the act of March 2nd, which applied to the whole Territory opened to settlement at that time, while the act of March 1st applied to only a part of it. Considering as we do, that the act of March 2nd wholly supercedes and takes the place of the former act, in regulating the disposal of all these lands, we will consider the act of March 2nd as governing this case. Article 1st of the Constitution of the United States provides that all legislative powers are vested in Congress. Article 4 Sec. 3, second paragraph, provides that Congress has exclusive power to make all needful rules respecting the disposal of the public lands The acts of Congress with the approval of the chief executive, and without it in some cases are supreme. This brings us to the consideration of Sec. 13th, act of March 2, 1889.

Commencing with the second provision in the second paragraph relating to the rights of honorably discharged Union Soldiers and Sailors, as follows: "And provided further that the rights of honorably discharged Union Soldiers and Sailors in the late civil war as defined and described in Sections 2304 and 2305 of the revised statutes shall not be abridged." Here is a statute enacted by Congress expressing in plain terms the wish or intention of the legislators that the honorably discharged Union Soldier is excepted from any thing in the act of March 2, 1889, that might be construed so as to abridge his rights as they are provided for in the sections of the revised statutes referred to in the proviso. It embraces the whole of the Soldiers' Homestead Act of June 8, 1872. Section 2304, the first referred to, among otner things provides that every private soldier and officer who served in the army of the United States during the recent rebellion for ninety days, and who was honorably discharged, and has remained loyal to the government (requiring just three qualifications) shall on compliance with the provisions of this chapter as hereinafter modified, be entitled to enter upon, and receive patents for 160 acres of any public lands not otherwise appropriated, and subject to homestead entry. We desire to emphasize the fact that it is on compliance with the provisions of the Soldiers' Homestead Act of June 1872, Chap 338, Sec. 1, Vol. 17, page 333 U. S. statutes at large, and not on compliance with the provisions of the act of March 2, 1889, that the honorably discharged Union Soldier is entitled to his homestead in the Oklahoma country. There is no sooner clause in the Soldier's homestead act. Chief Justice Dale delivers the opinion of the Supreme Court of Oklahoma Territory in which we find the following errors. First, in holding that Congress only intended that the ex Soldier should be allowed the privilege of filing his

declaratory himself or by an agent, have six months after making his filing before commencing his settlement and improvements, and to have the term of his service in the army, to the extent of four years deducted from the time required to secure title under the homestead laws. Second, in basing the court's judgment on the erroneous quotations of the Secretary of the Interior from pages 17 and 18 of Perkins & Chandler's brief in the case when it was before him. It was ~~the~~ an error of the Secretary to draw his conclusions and base his decision on statements made by attorneys, even if he had quoted the attorney's statement of the evidence correctly—which he did not do—and the defendant admits that he did not. The judge however quotes the error in full and approves it as a finding of fact by the Secretary that must stand against the plaintiff, while as a matter of fact it is only the Secretary's conclusion drawn from an erroneous statement of the evidence, and also a misstatement of Perkins & Chandler's brief. By reference to pages 17 and 18 of their brief it will be found that they make no such statement as the Secretary puts into his decision. See exhibit C., printed record, page 9, Perkins & Chandler state the facts as they are set out in plaintiff's petition in this case and shown by the evidence and admitted by the defendant's demurrer. Third, the learned justice errs in ignoring the admitted facts and bases his decision upon the Secretary's misquotation of the facts as stated by Perkins & Chandler. Fourth, in assuming that plaintiff gained an advantage over other settlers, in the absence of any such finding by the Secretary. Fifth, in ignoring the facts that the "sooner" clause is an additional qualification applicable to homesteads in Oklahoma, and that it was so held in the Smith-Townsand case by the United States Supreme Court, 148 U. S., page 490. Sixth, in ignoring our contention that this additional qualification does not apply to the honorably discharged Union Soldiers of the late civil war. Seventh, in misconstruing and misquoting the provisions of section 2304 and 2305 of the revised statutes of the United States relating to the rights of honorably discharged Union Soldiers in Oklahoma, the judge admits that if the proviso in the act of March 2nd relating to the rights of the ex-Union Soldier is not annulled by what is called the "sooner" proviso which followes it—he is not disqualified. Eighth, the court errs in holding that the finding of facts as stated by the Secretary in his final decisions (Exhibit C. printed record page 8) is sufficient to disqualify the plaintiff.

Taking the statement of the case by the Secretary, wrong as it is, there is nothing in it to disqualify the plaintiff. Supposing that plaintiff

had went to Oklahoma Station on April 22nd and finding his son there went with him to a tent that his son had put up on the land and then he had left his son in charge of the land while he returned to Guthrie and secured the entry, on the afternoon of the next day, April 23rd. This whole transaction is assumed to have and did occur after 12 o'clock, noon, April 22nd, and after the land was legally opened to settlement. There is no claim that it ocurred before the hour of legal opening, and in fact it did not. Except the visit to Oklahoma on the 20th, what is there in it to disqualify the plaintiff, or that gave him any advantage over other settlers? There was an opportunity to get ahead of plaintiff at the land office which is thirty miles from where the land is located, and there was also a chance to make a settlement on the land any time from noon of April 2, up to 2 o'clock April 23, the time when plaintiff made his entry. We can see nothing in this transaction, if true, to legally disqualify the plaintiff. But it is mainly incorrect—there is no such evidence in the case nor no such statement was made by plaintiff's attorneys in their brief. It was perhaps a mistake of the officer or clerk who wrote the Secretary's decision, but it is difficult to understand how such a mistake could occur when the party is copying a brief or any other paper in a a case before him. The evidence shows that plaintiff's son was a man 30 years of age and that he was on the claim with the intention of taking it himself, which he had a right to do. If plaintiff had failed to get his entry on this land he would have filed on some other quarter while he was at the office. His sons being on the land was of no benefit to him; and after the entry was made it held the land for six months agains the world except a prior settler. It seems from the numerous insinuations of the defense in the case that it is a wish with them to create the impression with the court that plaintiff's son was on the land for the purpose of keeping other settlers off until the entry was made. In anticipation of this we make the following explanation: All the evidence there is on this point is that of Ecklberger and his testimony is squarely against such a surmise. Echelberger testifies that he approached plaintiff's son while he was putting up his tent immediately after 12 o'clock and told him that the claim was taken, that it was his, that he Echelberger, was the first settler and plaintiff's son replied, "that was ll right." Echelberger further testifies that he himself put in the whole afternoon of April 22 pulling up stakes and notifying people that the land was his There is no evidence that plaintiff's son said anything to anyone about claiming the land and in fact he did not. Echelberger had it all his own way as claimant of the land This explains all these matters as they appear in the evidence. But leaving all this out, and putting it upon the ground

of a wholesome public policy, it seems heathenish, even if this young man was trying to assist his old father to get himself a home. For the courts to condemn his generous conduct by taking his father's home from him and giving it to the worst boodler in the gang of a half dozen greedy contestants; and one too who was and is yet in collusion with one of our citizen speculators who has furnished the money to push the contest through to a successful conclusion. To do such a thing as this where there is no clearly defined law forbidding any thing done or claimed to have been done in the premises, either by the plaintiff or by his son, seems wretchedly unjust and wholly without adequate cause or justification, either in the law or in equity. If the words "enter upon and occupy" are allowed to stand for what they are defined to mean by every authority, legal and literary, there is no ambiguity, no conflic of terms, but perfect harmony, and every part of Sec. 13 is given effect. The 4th proviso refers to these lands as homesteads exclusively; no person is permitted to occupy a homestead prior to the time fixed by the proclamation of the President opening the same to settlement. Did the plaintiff enter upon and occupy any of these lands during the inhibited period? That he did is the contetion of the defendant, and the question to be settled by the court It is admitted that the plaintiff entered the Territory on the Santa Fe railroad passenger train with the crowd on the day of the opening, and it is not claimed that any undue advantage was gained by the plaintiff over other settlers. The rule in construeing statutes is that the words of a statute are to be taken in their natural and ordinary signification and import, and if technical words are used they are to be taken in a technical sense. In the construction of laws we are to examine carefully the import of words and phrases, we know of no reason why this just and wholesome and long established rule should be departed from in this case. Enter upon, as used in the United States statutes relating to homesteads, relates to the enty at the land office, it is so used in Sec 2304 and 2309 and others But outside of this it has a general meaning as entering upon a farm, a field, a lot, a journey, a course of lectures, or study; this is the sense in which these words are used ordinarily. But Congress left no room for contention as to the meaning of the final act providing for the opening of these lands to settlement. By adding the words and occupy to the words "enter upon," making it read, "that no person entering upon and occupying said lands will ever be permitted to acquire title thereto." The word occupy has but one meaning, it is general and means taking possession of some specific thing for personal use or benefit. And there is no reason to doubt that Congress used it in this sense in the act of March 2,

1889. If we are not to know the law by taking the words of the statutes in their ordinary sense and as they are dfined in the standard dictionaries of our language, we should not be held responsible for its violation until after the courts have placed a construction thereon. We have discussed the question of proper construction, not because we think the court is not fully advised in all these rudimentary matters, but because the construction first put upon what is called the prohibitory clause was subversive of the law, and it opened the highway to the most vicious, cruel and conscienceless gang of contestants that ever infested a frontier settlement, and persecuted a poor helpless people. There was nothing in these contests for the government. No one was trying to swindle the government, and the goverament had nothing to gain by them nor nothing to loose, except its reputation. It was simply a greedy squabble between greedy individuals, mostly for speculative purposes on the part of the contestants in which the wrong was generally successful on account of a more perfect system of work. We desire to call the attention of the court to the fact that in Sec. 14 of the act of March 2, 1889, Congress provides for the purchase and opening to settlement of the Cherokee Strip, the Sac & Fox, the Iowa, the Pottawatomie and the absentee Shawnee reservations; and put into that section the same prohibitory clause applying to all these reservations, and in precisely the same words used in Sec. 13 of the same act relating to the Oklahoma lands. The Cherokee Strip was opened in September, 1893, four years after the Oklahoma lands. The other reservations were opened in 1891, over two years after the Oklahoma lands were opened. It seems hardly necessary to say that if the act of March 1st applied to the Seminole Indian lands it applied also to these other reservations, and if the prohibitory clause contained in the proviso in Sec. 13 of the act of March 2nd disqualifies every one who entered the Oklahoma Territory, the same prohibitory clause in Sec. 14 of the same act must have the same effect upon persons who were on the Strip or any one of the reservations herein referred to at any time before they were opened to settlement and after the passage of the act of March 2, 1889. Yet it has not been so held or even thought of. We refer to this provision in Sec. 14 of the act of March 2, 1889, for the purpose of showing that Congress had no intention of disqualifying persons who entered these reservations for other purposes than settlement. The Cherokee Strip was open in pursuance of the following act approved March 3, 1893: "The President of the United States is hereby authorized at any time within six months after the approval of this act and the acceptance of the same by the Cherokee Nation as herein provided by proclamation to open to settlement any or

all of the lands not allotted or reserved in the manner provided in Sec. 13 of the act of Congress approved March 2, 1889.

INDIAN APPROPRIATION BILL.

"No person shall be permitted to occupy or enter upon any of these lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement, and any person otherwise occupying or entering any of said lands shall forfeit all right to acquire any of said lands:" (2nd paragraph Sec 10 act March 3, 1893.) It will be observed that this Congress, the one succeeding the Congress that enacted the law opening Oklahoma to settlement made an effort in this act to bring the prohibitory clause in harmonious line with the decisions of the Land Department on the "sooner" problem It is a well settled rule in the land office practice to hold any suspicious circumstances in a case against the enteryman who refuses to go on the witness stand and testify. In this case the land office officials apparently have taken it upon themselves to discredit the testimony of the plaintiff and his son, notwithstanding the fact that their testimony is wholly uncontradicted.

The learned Justice in delivering the opinion in the Smith-Townsand case says the construction insisted upon by the plaintiff, Smith, that is living upon any tract of land prior to the time when the lands should be opend to settlement. Their idea seems to be that parties might go wheresoever they pleased through this body of land without subjecting themselves to the disqualifications of the law, provided only, that before the date fixed for the opening they did not commence an actual living upon the particular tract they desired to enter as a homestead. Under such a construction anybody might go into the Territory and every quarter section might be occupied by a resident, and all that would be necessary to prevent the operation of the statute would be that at noon of April 22nd adjoining neighbors exchanged their residence. If the contention in the Smith-Townsand case was as above understood it was certainly not the law The statute says no one shall be permitted to occupy any of these homesteads prior to the time they are opened to settlement, and any one who does so occupy, will not be permitted to enter any of said lands. That is to say that any one who moved into the Territory and settled upon any of the lands before the hour of opening for settlement was disqualified. This is the point we are contending for. We insist that the law does not disquallify a person who simply passed through or went into the Territory and passed out of it again, during the inhibited period. The extreme case suggested by the learned

Justice would be an evasion of the law both in letter and in spirit. But there is no law that disqualifies the plaintiff, and no reason can be given for holding that he is disqualified, except that the claim he entered is a very valuable one. The contention that a simple entry into the Territory during the inhibited period was sufficient to disqualify an otherwise legal homesteader, is without either support of the statute, or the rules of equity. The learned Justice refers to the well settled rule that where the language of a statute is ambiguous or of uncertain meaning resort may be had to surrounding circumstances. To the history of the time, and the mischief or defect, the statute was intended to remedy. Numerous cases are cited in support of this theory, and numerous proclamations issued by President Hayes, Arthur and Cleveland are referred to—all of these proclamations and decisions were against persons seeking to settle upon these lands. No such proceedings were had against any one simply going into that country as a traveler, hunter or curiosity seeker, or in any other capacity except with the intention of settling there. In referring to the prohibitory clause the learned Justice say it (the sooner clause) is an additional qualification applicable in Oklahoma, and that Congress had the right to prescribe additional qualifications when it opens a particular tract to occupation. The learned Justice remarks that there is no distinction in favor of those legally in the Territory, and that if Congress had intended for parties rightfully in the Territory should have special advantages in the entry of the desired tracts it would have been very easy to have said so. Thus he recognizes the power and right of Congress to provide and save the rights of these people by special provision the same as it did in case of the honorably discharged Union Soldiers and Sailors. And it would have been just as easy to have said that any person entering this Territory or going upon these lands prior to the time they are opened to settlement shall not be permitted to make entry of or acquire title to any of said lands. If Congress had so intended, and as it did not do this we conclude that it did not intend to do it. When plaintiff made his entry of this quarter section of land and settled upon it as alleged in his petition, he acquired a vested right to it and an inceptive title, such as the officials of the land office have no power to sequester, except through the regular proceedings of the Department. He can not be ignored out of his right to this land. Congress says that no person entering upon and occupying said lands will ever be permitted to acquire title thereto. Which means that no person who settles in Oklahoma and is occupying any of the lands during the prohibited period will be permitted to acquire title to a homestead in said Territory. We insist that the literal meaning of "enter upon and occupy" is to settle

upon, because it is defined to mean this by every authority, and every one who is well enough informed as to the meaning of these terms, know it is the ordinary meaning of enter upon and occupy, and to construe these terms to mean any thing else is to ignore a rule of construction that is laid down in every work on judicial construction, and a rule that has been followed for centuries in all parts of the civilized world. There are other reasons we submit, and very forcible reasons, for believing that Congress didn't intend to disqualify persons simply because they set a foot upon these lands. First, because if such was the intention the same provision that was in Sec. 2 of the act of March 1st would have been continued in the act of March 2nd without alteration or modification. That was all that was necessary to express the intention, if it was the intention, to disqualify all persons who entered the Territory between March 2 and April 22. The fact that the words "and occupy" were added, "to enter upon" clearly expresses the intention to modify the prohibitory clause which was in Sec. 2 of the act of March 1st, we don't believe that Congress intended to deceive the people. But it was doubtless the intention to give everyone, as nearly as possible, an equal chance to secure a home after the hour of legal opening, not only in the race but in the contests that followed; such a conclusion is reasonable and is doubtless correct. Congressmen were well aware that thousands of persons engaged in herding stock, building and operating railroads; government employees, such as soldiers surveyors, freighters, mail carriers and marshals, also hunters, trappers, travelers and boomers. All these had been passing over these Oklahoma lands for a quarter of a century, and thousands knew where the best lands were, and the best route to them from the nearest point on the line—also knew the surveys and right where the corners were. Congress wisely anticipated that other thousands of persons would be seeking homes in Oklahoma who knew nothing about the country and who had never been inside the lines of the Territory, and in view of the assumption that Congress intended to give every one a fair chance to secure a home, it is unreasonable to hold that it was the intention to compel those who were unacquainted with the country to make the race in the dark in competition with those who knew the country well. No plan more unfair could have been devised. Another reason for believing that there was no intention to disqualify persons who were in the Territory otherwise than as settlers is the fact that the boomer element who had been raiding the Oklahoma country for years, were represented by their leader, Capt. Couch, assisted by Sam Crocker, Sid Clark, Van Horn of the Kansas City Journal, and

others as lobbyists looking after their interests in the Congress that passed the act of March 2, 1889, and in addition to this the boomers had numerous friends who were members of Congress. Among them were Congressman Springer of Illinois, Perkins of Kansas, Mansuer of Missouri and J. B Weaver of Iowa. The prohibitory clause was fully discussed in the committee room by the committee on Territories and as adopted was accepted by the friends of the boomers and understood to be so worded as not to disqualify those who were in the Territory temporarily, and not as settlers. In addition to this, it was these men—the friends of the boomers—in congress, with Gen J. B. Weaver as their leader who forced the bill through Congress as a rider on the Indian appropriation bill, and it is a strange conclusion for us to form that these Congressmen who had charge of the bill, and who were the friends of the boomers, intended to enact a law that would disqualify the very people they were trying to assist; and that too, by an insidious intention not expressed in the law. The proviso relating to the rights of the honorably discharged soldiers contained in Sec. 13 clearly indicates the intention to only disqualify those who settled in the Territory before 12 o'clock, noon, on April 22nd. We insist that Congress also has the right to prescribe the law that shall govern and regulate the disposal of any particular tract. In this instance Congress said the act of March 2nd should apply to and regulate the disposal of the Creek or Muskogee as well as the Seminole Indian lands. The courts are bound by this provision the same as by other provisions of the law We insist that the act of March 1st, which was incomplete and only applied to a part of the lands, and upon which this decision seems to mainly rest, was displaced by the act of March 2nd and became obsolete by the approval of the final and complete statute containing all the necessary, and all the intended provisions and regulations for opening the Oklahoma lands to settlement. We desire here to call the attention of the court to the language of the president's proclamation declaring these lands open to settlement. "Now, therefore I, Benjamin Harrison President of the United States, by virtue of the power in me vested by said act of Congress, approved March 2, 1889, aforesaid, do hereby declare and make known, that so much of the lands as aforesaid, acquired from or conveyed by the Muskogee (or Creek) nation of Indians and from or by the Seminole Nation of Indians, respectively, as is contained within the following described boundaries (here follows description), will at and after the hour of 12 o'clock, noon, of the 22nd day of April next, and not before, be opened to settlement under the terms of and subject to all the conditions, limitations and restrictions contained in said act of Congress approved

March 2, 1889, and the laws of the United States applicable thereto." Here is the proclamation from the highest authority declaring to the people who are anxiously awaiting the opening of these lands to settlement. That they are opened and disposed of under and in accordance with the provisions of the act of March 2, 1889. Congress says so in the law. The President says so in his proclamation, and we contend that the people had a right to believe that the act of March 2nd alone was the law govering the disposal of these lands. The court in the Smith-Townsand case evidently did not consider the provisions of the act of March 2nd sufficient to justify the construction put upon it by the Secretary of the Interior. For some reason the Congress which succeeded the one which passed the act of March 2, 1889. In providing for the opening of the Sac & Fox, Iowa, Pottowatomie and absentee Shawnee lands inserted the same proviso relating to the honorably discharged Union Soldiers and Sailors as is in the act of March 2nd, providing for the opening of Oklahoma, with the exception that they provide for abridging his rights to the extent of paying the price fixed for the land. In this act Congress recognized the fact that Sec. 2304 of the revised statutes gives the soldier his land free. This exception against the old soldier has been religiously observed by the land office officials, and we insist upon the exception in the act of March 2, 1889, in his favor, being observed also. The learned Justice in delivering the opinion in the Smith Townsand case says: "It may be said that if this literal and comprehensive meaning is given to these words it would follow that anyone who after March 1st and before April 22nd should chance to step within the limits of the Territory would be forever disqualified from taking a homestead therein, doubtless he would be within the letter of the statute, but if at the hour of noon on April 22nd when the barrier was destroyed he was in fact outside of the limits of the Territory, it may perhaps be said that if within the letter he was not within the spirit of the law and therefore not disqualified." This closing paragraph in the Smith-Townsand decision covers our case, but as the defendant's claim rests wholly upon the plaintiff entering the Territory on April 20th, and on account of the extreme views of our Territorial courts in these cases, we have felt it our duty to fully discuss the act of March 2, 1889, and all the questions relating to the plaintiff's qualifications as a homesteader and his right to the land.

Our contention is that under the present construction of the act of Congress of March 2, 1889, and the authorities cited the plaintiff was and is a qualified entryman and the cancellation of said entry was and is illegal and made under a misapprehension of law and is void.

Our next contention is that plaintiff being as admitted an honorably discharged Union Soldier and his entry being made under Sec. 2304 and 2305 of the revised statutes of the United States, the prohibitory clause does not apply to him, it being held both by the Supreme Court of Oklahoma and of the United States in the case of Smith vs. Townsand—Supra—to be a qualification and not a penalty, and that soldiers such as those described in Sec. 2304 (and the plaintiff is such) are excepted from the prohibitory provisions of said Sec. 13. If it is decided an additional qualification then its application to plaintiff would be an abridgement of his rights as defined under the sections aforesaid of the revised statutes.

It seems hardly necessary to cite further authorities in this case, as the only question to be decided by the court relates to plaintiff's qualification as a homesteader in the Oklahoma Territory. However, we cite the following authorities:

Black on Interpretation of Laws, page 270, defines the office of a proviso as follows and cites numerous authorities:

"A proviso is a clause added to a statute or to a section or part thereof which introduces a condition or limitation upon the operation of the enactment or makes a special provision for cases excepted from the general provisions of the law or qualifies or restrains its generality or excludes some possible grounds of its misinterpretation or of its extent."

The Supreme Court of the United States in Lysander vs. Babbitt et. al., 1 Black 55 to 62, Co-operative Edition, book 17 bottom page 94, and in construing a provision of an act of Congress applying to a class of officers says:

"We are of the opinion that the proviso referred to is not limited in its effect to the section where it is found; but that it was affirmed by Congress as an independent proposition and applies alike to all officers of this class."

As to limitations and constructions of provision see Black on Interpretation of Laws, page 273-275 and cases there cited, also Sutherland on Construction of Statutes title "Proviso" page 289, Sec. 218, defining office of proviso, same Sec. 222 to 225.

The foregoing authorities sustain our contention that the true construction of the proviso as a saving clause was and is that no other requirements than those enumerated in Sec. 2304 2305 of the revised statutes should be imposed on the class of persons enumerated. Nor should their right to enter and take a homestead be in any manner affected but should remain unabridged by any provision or provisions of said act of which it is a part, any other construction would render it nugatory and

defeat the very purpose of Congress to preserve intact all the rights of the class of persons named, as those rights existed prior to the passage of said act of 1889, and under the provisions of the revised statutes especially enumerating and defining them in consideration of the services rendered to the country.

The Land Department wholly overlooked the saving clause in favor of honorably discharged Union Soldiers and placed them on the same footing as other persons to whom the act of Congress applied generally. This was an abridgemnt of the plaintiff's rights, and the cancellation of his certificate was in violation of law and does not divest him of his right and superior equity in the land and gives him a standing in the court on the facts as set out in his petition to the relief prayed for.

In support of this right we refer to the case of Johnson vs. Townsley 13 Wallace, 72, and Rector vs. Gibbons, 111 U. S. page 276; in the latter case the court refering to the case of Johnson vs. Towsley says:

"This case is a leading one in this branch of the law and has been uniformally followed. The decision aptly expresses the settled doctrine of this court with reference to the action of the officers of the Land Department when the legal title has passed from the United States to one party when in equity and good conscience and by the laws of Congress it ought to go to another. A court of equity will convert the holder into a trustee of the true owner and compel him to convey the legal title. This doctrine extends to all officers having charge of proceedings for the alienation of any portion of the public domain. The party actually entitled under the law cannot because of the misconstruction of these officers be deprived of their rights."

The law has been disregarded and misunderstood by the officers of the Land Department and the rights of the plaintiff ignored and his entry finally wrongfully cancelled as to the entire tract. The court below erred in sustaining the demurrer to plaintiff's petition and dismissing his suit; to which he excepted at the time and appeals to this court to secure a reversal for the errors assigned; each and every error assigned is insisted upon as well taken.

CALVIN A. CALHOUN,
Appellant.

CALHOUN *v.* VIOLET.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 180. Submitted January 20, 1899. — Decided February 20, 1899.

The provisions in the act of March 2, 1889, c. 412, 25 Stat. 980, 1005, with regard to honorably discharged Union soldiers and sailors were intended only to give them an equal right with others to acquire a homestead within the territory described by the act, but did not operate to relieve them from the general restriction as to going into the territory imposed upon all persons by the provisions of the act.

THE case is stated in the opinion.

Mr. Calvin A. Calhoun in person for appellant.

No appearance for appellee.

MR. JUSTICE WHITE delivered the opinion of the court.

The plaintiff sued to recover a described piece of land upon the assumption that the defendant held it in trust for him. The prayer of the petition was that the trust be recognized and the defendant be decreed to make conveyance of the land. A demurrer was interposed, which was sustained by the trial court, and the suit was thereupon dismissed. On appeal to the Supreme Court of the Territory, the action of the trial court was affirmed. The present appeal was then taken, and the issue which arises is this: Did the court below err in deciding that the petition of the plaintiff did not state a cause of action?

The facts alleged in the petition and shown by the exhibits which were annexed to it are as follows: The plaintiff Calhoun, an honorably discharged soldier, who was in all general respects qualified to claim a homestead under the law, Rev. Stat. §§ 2304 *et seq.*, seeking to avail himself of his right, entered, on April 23, 1889, at the United States land office at

Guthrie, Oklahoma, "lots 6, 7, 8, 9 and 10 of section 3, township 11 north, range 3 west, in the aforesaid land district." The petition alleged that Calhoun had performed all the subsequent acts required by law to make the entry valid. On May 21, 1889, Theodore W. Echelberger contested the entry on the ground that Calhoun had come into the Territory of Oklahoma before the time when by law he had a right to do so, in violation of the statute of the United States and of the proclamation of the President issued in pursuance thereof. 25 Stat. 980, 1004; *Payne* v. *Robertson*, 169 U. S. 323; *Smith* v. *Townsend*, 148 U. S. 490. On the 27th of May, 1890, James McCornack also filed a contest against both Calhoun and Echelberger, alleging that they were both disqualified because they had during the prohibited period entered the Territory. On June 29, 1890, contest was also filed by Thomas J. Bailey, charging the illegality of the claims of Calhoun, Echelberger and McCornack, averring that he, Bailey, was the first legal settler on the land and entitled to it. On January 25, 1890, one Linthicum filed a contest against lot No. 10, embraced in the entry made by Calhoun, on the ground that that lot was on a different side of the Canadian River from the balance of the land embraced in the entry, and as the Canadian River was a meandering stream, the entry could not lawfully cover land situated on both sides thereof, hence lot 10 had been illegally included in the Calhoun entry.

In February, 1890, the Commissioner of the General Land Office instructed the local land office to suspend, among others, the entry made by Calhoun, because the land covered by it was on both sides of a meandering stream, and hence entry thereof had been improperly allowed. The instruction transmitted to the local officer concluded as follows: "You will notify the claimant of this fact" (that is, of the suspension of his entry) "and allow him thirty days from receipt of notice in which to elect which portion of his claim he will relinquish, so that the land remaining will be confined to one side of such stream. Should any of the parties desire to do so, he may relinquish his entire entry; in which event an applica-

tion to make a second entry of a specific tract will receive due consideration. If any of the entrymen fail or refuse to take action within the time specified, his entry will be held for cancellation. Notify the parties in accordance with circular of October 28, 1886, (5 L. D. 204,) and in due time transmit the evidence of such notice with the report of your action to this office." Conforming to this notice, Calhoun, on the 17th of March, 1890, filed in the local office a formal relinquishment of "all that portion of land on the right bank of the North Canadian River known and designated as lot No. 10 (ten) in the N. W. quarter of section 3, township 11 N., range 3 west, Guthrie land district, the same having been embraced within my original entry No. 19, dated April 23, A.D. 1889."

On the 30th of October, 1890, all the contests above referred to were duly heard before the register and receiver of the local office, and it was decided that both the plaintiff and Echelberger were disqualified from taking the land because they had gone into the Territory before the time fixed by law, and that McCornack was entitled to enter the land. The claims of Bailey and Linthicum were rejected. From this decision the contests were carried to the Commissioner of the General Land Office, by whom the action of the local officers was affirmed, and thereupon an appeal was prosecuted to the Secretary of the Interior, with a like result. Subsequently, in 1894, on a petition for review by Calhoun and another of the parties, the Secretary of the Interior reiterated the previous ruling, affirming the action of the Commissioner of the General Land Office in rejecting the claims of Calhoun and others on the ground that they had been made in violation of law. Pending the appeals and decisions thereon as above stated, Calhoun filed with the Commissioner of the General Land Office an application complaining of the order which had compelled him to elect to which side of the river he would confine his entry, asserting that the action of the Department was illegal, as the stream was not a meandering one, and asking a revocation of the order.

The petition filed in the court below moreover contained an

averment that the rulings of the local land officers, of the Commissioner of the General Land Office and of the Secretary of the Interior, above stated, were null and void, because all these officers had misconceived the evidence and disregarded its weight, and was in violation of law, because the section of the act of 1889, forbidding going into the Territory before a named date of persons desirous of taking land therein, had no application to honorably discharged soldiers entitled as such to make a homestead entry. The land as to which it was averred the trust existed and a conveyance of which was sought was lot 10, as to which the relinquishment had been filed, under the circumstances above mentioned. It was charged that, despite the protest of Calhoun, a final certificate for this lot had been issued to the defendant, with full knowledge on his part of the claim of Calhoun, hence it was asserted the trust arose and the obligation to convey resulted.

The court below held that it was bound by the action of the Land Department in so far as that department had decided as a matter of fact that Calhoun had made entry of his land by going into the Territory contrary to the restrictions imposed by the act of Congress, and that in so far as the ruling of the Land Department rested upon a matter of law, it had been correctly decided that Calhoun, as a discharged soldier, was not entitled to go into the Territory contrary to law, and thereby acquire a priority over other citizens.

The first of these rulings was manifestly correct. It is elementary that, although this court will determine for itself the correctness of legal propositions upon which the Land Department of the government may have rested its decisions, it will not, in the absence of fraud, reëxamine a question of pure fact, but will consider itself bound by the facts as decided by the Land Department in the due course of regular proceedings, had in the lawful administration of the public lands. *United States* v. *Minor*, 114 U. S. 233; *Lee* v. *Johnson*, 116 U. S. 48; *Sanford* v. *Sanford*, 139 U. S. 647.

The fact that the plaintiff had entered the Territory prior to the time fixed by the statute and the proclamation of the President, having been conclusively determined, it follows in-

evitably, as a legal result, that an entry of land made under such circumstances was void and that the ruling by the Land Department so holding was correct. This leaves only open for our consideration the legal question whether Calhoun, because he was an honorably discharged soldier, was entitled to go into the Territory before the designated time and make a valid entry of a homestead therein. The claim that he was authorized to do so is based on a proviso contained in section 12 of the act of March 2, 1889, c. 412, § 13, 25 Stat. 980, 1005, which is as follows:

"And provided further, that the rights of honorably discharged Union soldiers and sailors in the late civil war as defined and described in sections 2304 and 2305 of the Revised Statutes shall not be abridged."

The sections of the Revised Statutes to which this proviso relates simply invest honorably discharged soldiers with the right to enter a homestead.

The proviso in question is immediately succeeded by the following:

"And provided further, that each entry shall be in square form as nearly as practicable, and no person be permitted to enter more than one quarter section thereof, but until said lands are open for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto."

It is manifest from the context of the act that the proviso relied upon was intended only to give to honorably discharged soldiers and sailors an equal right with others to acquire a homestead within the territory described by the act, and the proviso was thus intended simply to exclude any implication that they were, in consequence of the prior provisions of the act, not entitled to avail themselves of its benefits. The proviso therefore in no way operated in favor of honorably discharged soldiers and sailors to relieve them from the general restriction as to going into the territory imposed upon all persons by the subsequent provisions of the law. To hold the

contrary would compel to the conclusion that the law, whilst allowing honorably discharged soldiers and sailors to take advantage of its provisions, had at the same time conferred upon them the power to violate its inhibitions. The purpose of Congress in allowing those named in the proviso to reap the benefits of the law was not to confer the power to do the very thing which the act in the most express terms sedulously sought to prevent.

Affirmed.